INSTITUTE OF LAW RESEARCH AND REFORM
THE UNIVERSITY OF ALBERTA
EDMONTON, ALBERTA
REPORT NO. 45

STATUS OF CHILDREN: REVISED REPORT, 1985

NOVEMBER, 1985

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PREFACE

This report is in substance a reissue in updated form of our Report 20, Status of Children. Report 20 had two principal purposes. One was to give the equality before the law to all children, whether born inside or outside wedlock. The second was to provide a legal framework which would encourage fathers of children born outside wedlock to establish and maintain father-child relationships with their children.

We are issuing this Report 45 in order to comply with a recommendation made by the Legislature's Standing Committee on Law and Regulations. At the Fall Session of 1984 the Legislature asked the Standing Committee to consider and report upon a number of the Institute's reports, of which Report 20 was one. The Standing Committee duly considered Report 20 and reported to the Legislature at the Spring Session of 1985. The Standing Committee approved the principles in Report 20 but recommended that the Institute be requested to submit a report to the Government respecting the changes in the law since Report 20 was first issued.

The most important legal change which has occurred since we issued Report 20 is the adoption of the Canadian Charter of Rights and Freedoms. The Charter's principle of equality before the law is the principle which animated Report 20, and it therefore, in our opinion, supports our principal recommendations and may even require that something like them be adopted. The abolition of discrimination against children based upon the marital status of their parents and the provision of a rational framework for the recognition of parent-child relationships

would, we think, transform the law in conformity with the spirit of the Charter and also in conformity with the spirit of common fairness and justice. We think that our incidental proposals also conform to the spirit of the Charter and will be found to be justified under it.

The other changes which have occurred in the law in the intervening years affect some of the detail in Report 20. They do not affect the principles upon which it was based. We think that the most helpful course of action we can follow is to issue a revision of Report 20 which includes all of the original text which is still applicable and accurate and which shows the revisions which we have made. This is that revision. In general this Report 45 amends Report 20 only where a change in the law has made amendment necessary. We have, however, made a few additional changes in the detail of our original recommendations to take advantage of later thinking on the subject. All changes made in the original recommendations have been underlined where the recommendations appear in the text of Report 45 and also where they appear in the List of Recommendations which we have inserted at the end of the text of Report 45.

We have, however, deleted one subject from Report 45. It is the legal parentage of children born as a result of artificial insemination with semen from a donor. During the Standing Committee's consideration of the report a member of the Standing Committee inquired why we had dealt with the parentage of children born by artificial insemination but not with the parentage of children born by other artificial means. Our reason was that when we did the work which led to Report 20 that broader

question had not yet come to the fore. Upon reflection now, we think that it would be better if the various artificial forms of human reproduction were thought about together. That would, however, involve a great amount of work and delay--the Ontario Law Reform Commission has recently issued a long and complex report on the whole subject of artifical human reproduction--and we thought that we should not delay this revised report dealing with the urgent questions relating to children born outside wedlock. The great questions about human artificial reproduction and the parentage of the children born by artifical means will have to await further study.

We have not revised or reproduced the draft legislation which we attached to Report 20. We have, however, reproduced and attached the original appendices.

I

INTRODUCTION AND SUMMARY

The law distinguishes between persons born in wedlock and persons born out of wedlock. The distinctions are to the disadvantage of the person born out of wedlock, and we see no reason why the law should not do what it can to remove that disadvantage. To that end, we will propose that the legal distinction between legitimate children and illegitimate children be done away with.

The law should so far as possible give equal treatment to all children, but it does not follow that it should apply precisely the same rules to children born out of wedlock as it does to those born in wedlock. It recognizes the father and mother of a child born in wedlock as joint guardians of the child, but we think that it is not necessarily in the best interest of children born out of wedlock that that rule apply. We will therefore propose that the father and mother be joint guardians only if a stable relationship exists between them at the birth of their child out of wedlock; we will go on to propose that in other cases the law continue automatically to recognize only the mother as guardian, but that it allow the father to become a guardian if he can show that that arrangement is in the best interest of the child.

In order to give effect to the principle of equal treatment by the law and to give effect to the principle that guardianship should be conferred only in the best interest of the child we will make a number of recommendations. These will be that there be one status for all children; that the legal relationship of

child and parent be dependent on their biological relationship; that, with the exception of parental guardianship, all rights and obligations of the child born out of wedlock, of a parent, or of any other person be determined in the same way as if the child were born in wedlock; that the father of a child born out of wedlock be a guardian if there is a stable relationship between himself and the child's mother; and that in the absence of a stable relationship the father have the right to be appointed guardian by the court if the appointment is in the best interest of the individual child concerned.

We will now proceed to give some historical and statistical background against which the law relating to children born out of wedlock should be assessed, and will then give our detailed recommendations and reasons.

II

HISTORY OF ILLEGITIMACY

The basis for the legal distinction between legitimacy and illegitimacy is historical. However, over the course of history, the legal position of an illegitimate child has not always dovetailed with his social position. Although at common law an illegitimate child was filius nullius--meaning "no one's son"--he was acceptable as a person to the feudal community and was not an object of social disgrace. His major legal disability in feudal times was his inability to inherit land, a disability attributable to the fact that certainty of ownership, and therefore of the identity of heirs, was fundamental to the feudal land-holding system. Some historians have suggested that the illegitimate child's legal position might more accurately have been described as heres nullius--meaning "no one's heir".

As the Church became more dominant in medieval English society, and as it became more strict in its attitude toward extra-marital sexual relationships, the social position of an illegitimate child--the product of extra-marital intercourse--deteriorated. With this growing social rigidity, the description of an illegitimate child as "no one's son" took on greater meaning.

At the same time, this restrictive view of the legal relationships of an illegitimate child had drawbacks in that there was no person who could be held responsible for maintenance of the child and the burden fell on the Parish. The Poor Law Acts, beginning in 1576, came to recognize the relationship of mother and child for the purpose of placing the duty of

maintenance on her. The duty was probably placed on the mother rather than the father because of her more obvious biological connection with the child.

The Poor Law Acts did not accord any rights or special standing to the relationship existing between the mother and her illegitimate child. During the latter half of the nineteenth century, however, courts of equity began taking cognizance of her biological relationship to her child and were preferring her over others in custody proceedings, for the benefit of the child. In Alberta today there exists a full legal relationship between an illegitimate child and his mother, that is, a relationship which parallels the relationship of a legitimate child to his mother.

The law has shown reluctance to give similar recognition to the relationship of an illegitimate child to his father. For many years, a father has been liable to maintain his illegitimate child under affiliation legislation; "An Ordinance Respecting the Support of Illegitimate Children" passed in 1903 (c. 9, 2nd Sess.) so provided for the North West Territories and was incorporated in the law of Alberta when Alberta became a province in 1905. His duty is similar to the one imposed on the mother under the Poor Law Acts and their purpose is the same--to relieve the state of the burden of maintaining illegitimate chidren.

More recent Alberta legislation recognizes the relationship of illegitimate child and father for some purposes which are for the benefit of the child. Such legislation has largely to do with the extended provision of maintenance for the child, for example, under the Workers' Compensation Act, the Fatal Accidents Act, and the Family Relief Act.

The father bears the burden of financial duties, but as yet the law does little to give effect to the social relationship which may exist or come to exist between an illegitimate child and his father. Much of this report is directed toward an examination of the law having to do with the relationship of child and father, and of the desirability of changing the law to recognize the relationship if the change will result in a benefit to the child born out of wedlock.

With the historical changes in the law surrounding the illegitimate child came changes in the language used to designate the child. He began as a bastard, became an illegitimate child, and now in a further softening of terminology, is often called a child born out of wedlock. In truth, it is the behaviour of the child's parents which produces the label, and we use the phrases "unwed mother" and "unwed father" to describe parents who are not married to each other.

III

INCIDENCE OF ILLEGITIMACY

An illegitimate child is in general a child whose parents are not married to each other. However, if before the child's conception or birth his parents go through a ceremony of marriage which one or both of them believed to be valid, the child is legitimate. If his parents marry each other after his birth, or, if he is adopted, he becomes legitimate. The illegitimate child may be the offspring of a couple cohabiting together in a stable relationship without marriage--popularly, although inaccurately, labelled a "common law" marriage: such a relationship may exist because of some legal impediment standing in the way of marriage, or because of a conscious decision rejecting marriage. He may be the child of a single woman and the product either of a fleeting affair or of a full-blown romance. He may be the child of a married woman who has engaged in sexual relations with a man not her husband, or he may be the product of artificial insemination of a woman using semen from a third party donor. In more bizarre cases, he could be born of a rape or of an incestuous relationship. The possibilities are numerous. At times his father will be very well known to him; at other times, his father will be a stranger.

Statistics compiled by the Department of Social Service and Community Health (Appendix I, Table I) show that illegitimate births rose from 2,681 in 1963 to 4,146 in 1970, that they declined to 3,050 by 1972, and have again arisen to 3,411 in 1974. The most recent figures available from Statistics Canada in 1976 showed that in 1973 illegitimate births comprised 11% of

the total live births in the whole of Canada (these percentages are based on births in which parents reported themselves as not having been married to each other at the time of birth or registration). The magnitude of the number of illegitimate children born annually in Alberta emphasizes the need to ensure that the law of Alberta deals fairly with them. For 1982-1983 Statistics Canada reported over 45,000 live births in Alberta, with the mother's marital status being given as single in more than 6,000 cases, and the Alberta Bureau of Statistics showed nearly 7,400 illegitimate births to Alberta residents in 1983.

Table I reveals that a significant number of illegitimate children are born to a "common law" union, that is, to a mother who is living together with a man as his wife but is not married to him. In 1974, this was the case for 23.86% of all illegitimate births. For previous years the figure varies from 17.74% in 1972 to 50.84% in 1964 and 40.28% in 1973; the average for the past twelve years is 30.39%. We have no evidence as to the duration of these unions, nor do we have current statistics, but it would seem that a substantial number of illegitimate children may enjoy a relationship with both mother and father as long as the relationship of their parents remains stable. There may be some cases in which the child is born of an earlier relationship and the figures are questionable to that extent.

We noted in 1976 that, as shown in Table II of Appendix I, there had been a steady reduction since 1968 in the percentage of children illegitimate at birth who had been surrendered for adoption and a decrease in the absolute number of surrenders from 1,380 in 1969 to 588 in 1974. In 1968 the percentage was 37.9%,

and it had varied between 34.9 and 37.9% since 1963; by 1974 it was only 17.2%. Those facts may indicate a trend among unwed mothers to bring up their illegitimate children themselves. If the mother is in contact with the father, it is likely that the child will know, or at least know about, his father. We do not, however, have more recent statistics.

We will now turn to the existing law.

IV

EFFECT OF EXISTING LAW

A child conceived by or born to a married couple is legitimate, and there is a very strong presumption that a child conceived by or born to a married woman is her husband's child and therefore legitimate. Since 1960 the Legitimacy Act makes legitimate some children who would otherwise be illegitimate: a child whose parents marry after his birth; the child of a voidable marriage which is afterwards cancelled; the child of a marriage which is void because one of the parents had at the time of the marriage a living spouse who had been presumed dead; and the child of a void marriage if the marriage was properly registered and recorded and was reasonably thought by one or both of the parents to be valid. The Child Welfare Act makes an adopted child the legitimate child of the adopting parents.

A child who was not conceived or born in wedlock and who has not been legitimated by the Legitimacy Act or by adoption is illegitimate.

The law places upon the mother and father of a legitimate child the responsibility of meeting his physical and emotional needs, and it confers upon them the right to make decisions on the child's behalf and for his well-being. If they do not exercise their rights the law provides a means of removing them as guardians but that removal does not destroy the other aspects of the parent-child relationship such as the child's right to be supported and his right to inherit upon the death of an intestate parent. The law makes an unspoken assumption that it is in the best interest of a legitimate child to be brought up by his

natural mother and father, and disturbs the parent-child relationship only when it has been demonstrated that that is what the best interest of the child requires.

The law confers the same rights and imposes the same responsibility upon the mother of an illegitimate child, but not upon the father, who is not a guardian, does not ordinarily have the right to participate in decisions relating to the control and upbringing of the child, and probably has no status in connection with adoption proceedings though in some cases he may have the right to apply for custody of or access to the child. It imposes an obligation to support the child, but does so by a different procedure. The illegitimate child inherits from an intestate mother in the same way as does a legitimate, but inherits from an intestate father only if there is no widow or legitimate child, and inherits under a will only if it is clear from the will that the testator intended to include the illegitimate child.

The legal division of children into legitimate and illegitimate is artificial in that it may have little relevance to a child's immediate environment and to his social relationship with his parents; and it may produce results which are unfortunate for the child. To illustrate this point, in this and the following paragraphs we will describe the effect of these distinctions upon the lives of two children, one of whom is the legitimate child of a valid marriage and the other of whom is the illegitimate child of a common law union. The existing law, of course, fosters the relationship of the legitimate child with his mother and father and makes the mother and father joint guardians of their legitimate child. However, while it fosters the

relationship of the illegitimate child with his mother, it discourages his relationship with his father by making the mother alone, and not the father, the guardian. Assume that both the legitimate and illegitimate child live in a happy family setting with both parents. Looking at matters from the child's perspective, it is illogical for his legal relationship with his father to be different in these two cases.

Assume now that disharmony develops between the parents in both cases and they separate. The mother and father of the legitimate child have equal standing to apply for custody of or access to the child. In the case of the illegitimate child, however, the mother will be entitled to custody of the child as sole guardian (though there is now a question whether this provision of the Domestic Relations Act is valid under the Canadian Charter of Rights and Freedoms.) There is uncertainty as to the standing of the father of an illegitimate child to apply for custody or access, and therefore of the right of the child to be reared in the custody of the father or to maintain personal contact with him, though judicial decisions given since Report 20 was issued have stengthened the unwed father's position.

Now suppose that the state intervenes by taking proceedings to place the child under the permanent guardianship of the Children's Guardian and to terminate parental rights. Both the mother and the father of the legitimate child are entitled to be notified of such proceedings and to take part in them. In contrast, only the mother of an illegitimate child is entitled to notice. The father is not entitled to receive notice.

The child's ties with his biological parents may be severed by the appointment of the Children's Guardian as the child's permanent guardian. They may also be severed on adoption. The consent of both the mother and father to the adoption of their legitimate child is necessary. The decision of the Supreme Court of Canada in the case of Gingell v. The--Queen (1975), 55 D.L.R. (3d) 589, states by way of obiter dictum that the consent of the mother of an illegitimate child to adoption is required in Alberta, but that the consent of the father is not. That is because the mother is sole guardian of her illegitimate child and it is the guardian's consent which is called for. The Child Welfare Act makes it clear that if the mother voluntarily agrees to give custody of her illegitimate child to the Director of Child Welfare for the purposes of adoption, her consent alone is sufficient.

Let us take a look at the question of the maintenance of the child. The mother and the father have an obligation to maintain their legitimate child during minority. That is also true of the mother and father of an illegitimate child; however, the father's obligation is enforceable only if proceedings to enforce the duty are taken within a short period of time following the child's birth or an act by which the father acknowledges paternity. In the case of the illegitimate child paternity must be proved before the obligation can be enforced, whether or not the parents are living together, whereas in the case of the legitimate child the husband of the woman who gave birth to the child is presumed to be the father unless and until his paternity is disproved as a fact.

Finally, suppose that the child's father dies without leaving a will. The legitimate child may share in his father's estate. The illegitimate child may share in his father's estate but only if his father has left no widow or legitimate children. It does not matter whether the father was living with the child at the time of his death or how much the father had accepted and treated the child as a member of his family.

We have tried to describe in a short space the effect of the distinctions which the law makes between legitimate and illegitimate children. We refer the reader to Appendix II for a more detailed comparison.

The law should not punish one person for the conduct of others. That however is what it does when it inflicts adverse consequences upon an illegitimate child because the child's parents did not marry each other or because one or both had married someone else. The parents' marital status has nothing to do with the child's needs. The law should be reformed so as to treat all children the same, whether they are born in or out of wedlock, unless the circumstances or needs of an individual child require different treatment. In so saying we do not comment on the morality of the child's parents, nor suggest reforms for their sake; the reform should be in the best interest of children born out of wedlock.

V

PUBLIC OPINION

We think that the proposals which we will make are in line with the opinion of society.

For the past three quarters of a century Alberta's legislation has given increasing recognition to the illegitimate child in his relationship with his parents. In 1901 the illegitimate child was allowed to succeed to the personal property of his deceased intestate mother, and in 1906 to her real property. In 1908 the illegitimate child was recognized as a "dependant" for workmen's compensation, and in 1922 the recognition was extended to compensation under the Fatal Accidents Act. In 1913 the illegitimate child was permitted to become legitimate through adoption. In 1927 the mother of an illegitimate child was created a guardian by statute. In the same year, the common law rule of construction of a will that the word "child" excludes an illegitimate child was reversed in respect of the mother. In 1939 the illegitimate child was allowed to share in the estate of his deceased intestate father, though only where there is no widow or legitimate child. In 1960 the Legitimacy Act made legitimate some persons who would be illegitimate at common law. In 1969 the illegitimate child was allowed to claim maintenance from his deceased father's estate under family relief legislation.

Since Report 20 was issued, Ontario, New Brunswick and Manitoba have legislated to give children born out of wedlock the same status and rights as children born in wedlock. New Zealand, Tasmania and Queensland had already done so. Elimination of the

distinction had been recommended by the British Columbia Royal Commission on Family and Children's Law. It is embodied in the Uniform Parentage Act adopted by the American National Conference of Commissioners on Uniform State Law in 1973, which has been enacted by 15 states. Some American States have tried to achieve a similar result by declaring all children legitimate. England and Western Australia have in recent years gone so far as to eliminate the distinction for purposes of succession on intestacy, though not so far as to eliminate it entirely. In 1982 the Uniform Law Conference of Canada adopted a Uniform Child Status Act which would make a child's status independent of the marital status of the child's parents.

Some recent judicial decisions have given greater recognition to the relationship between the illegitimate child and his father. In White v. Barrett, [1973] 3 W.W.R. 293 (Alta. App. Div.) and Nelson v. Findlay and Findlay, [1974] 4 W.W.R. 282 (Alta. S.C.) Alberta courts have recognized the father as a parent for certain purposes, and so has the Supreme Court of Canada in Gingell v. The Queen (1975), 55 D.L.R. (3d) 589. These decisions are based upon statutory interpretation of words denoting familial relationship such as "parent" or "father" and not upon any broad principle of recognition of the relationship between the illegitimate child and his father, but in each case the court could have justified a contrary conclusion and the cases do demonstrate that the courts are willing to recognize the relationship.

There is also some evidence available as to the present state of public opinion in Alberta. In 1973, Downey Research

Associates Limited conducted a survey of public opinion about illegitimacy for the then Department of Health and Social Development in cooperation with this Institute. The results of the survey show that, in principle, the public strongly favour assimilation of the law relating to illegitimate children, and while there is less of a preponderance of opinion in the answers to some more specific questions, we think that the results may be accepted as valid. A summary of the survey prepared by Michael C. Jansson, formerly a Research Officer with the Department, is reproduced in Appendix III.

VI

SOME ARGUMENTS AGAINST EQUAL TREATMENT

We will now mention some arguments which have been advanced against improving the position of the illegitimate child, and will give our reasons for not accepting them.

1. Stability of the Family and of the Institution of Marriage

Some persons argue that improving the legal position of the illegitimate will remove respect for legitimacy and therefore for marriage and family. They fear the consequences of recognizing in extra-marital family relationships or some of them (for example, the "common law" marriage) the same attributes as exist in families in which the parents are married to each other, and of rewarding unwed parents with the same legal rights as married parents, whatever the benefit for the child.

A second argument against reform, advanced when either or both parents are married to someone else, is that existing family units will be disrupted. According to the advocates of this argument, removal of the distinction between legitimacy and illegitimacy is likely to produce discord in the father's legitimate family to the extent that the father is forced to divide his loyalties--and his money--between two or more families.

A third argument against reform is based on the notion that marriage implies consent to be obligated to the children of the union; there is no consent to be obligated to an illegitimate child. That is to say, persons engaging in extra-marital sexual relations do not undertake the responsibility for their offspring

which is implied by marriage.

We believe that all of these arguments are overborne by concern for the innocent child. With regard to the first, we do not think that the institution of marriage is founded upon unfairness to the children of unmarried parents. With regard to the second, the father is already responsible for the maintenance of the child and our recommendations would not require the child to be brought into the father's legitimate family circle against the father's will. With regard to the third, the law already imposes responsibility upon the parents.

2. Sexual Promiscuity

The argument is sometimes made that a greater legal recognition of the relationship between an illegitimate child and his father will lead to greater sexual promiscuity, but we do not agree. We doubt that the withholding of rights and privileges from illegitimate children and their parents has much influence on indulgence or lack of indulgence in sexual relationships outside of marriage; and the greater emphasis on parental obligation toward the illegitimate child may have the effect of discouraging indiscreet sexual relations.

3. Pace of Reform

Another question to be considered is the pace at which reform should take place and whether it should lead or follow changing social attitudes. It is arguable that the distinction between legitimacy and illegitimacy has stood the test of time and that it would be risky to abolish it entirely when the implications of abolition are so difficult to predict: the

distinction is time-honoured and society is not ready for radical change; to go the full distance would be to advance too far too fast; the law should reflect social attitudes, not attempt to modify or lead them. We have given evidence that social attitudes call for change and we think that the law can safely take the lead, especially because of its manifest unfairness to the illegitimate child at the present time.

VII

PROPOSALS FOR REFORM

1. Principle: Equal Treatment

We have said that the law should be reformed so as to give equal treatment to all children, whether born in or out of wedlock. The next question is how equal treatment can best be given.

One way would be to eliminate legal distinctions between legitimate and illegitimate children where possible but to retain the basic distinction of status; that would be consistent with the series of provincial statutes which have made specific improvements in the illegitimate's status over the years, and with the English and Western Australia legislation eliminating the distinction for the purpose of succession on intestacy. That process of elimination, if carried rigorously to a conclusion, would lead to the equal treatment of children. A second way would be to add to the grounds upon which a child is legitimate, for example, by treating him as legitimate if his parents cohabit for a prescribed time before birth. That would result in the quantitative reduction of the problem of illegitimacy but not its eradication, though eradication could be affected by statute declaring all children legitimate. Either approach could leave some distinctions in force.

Our original view was that the differences in the circumstances of legitimate and illegitimate children would compel the retention of the status of illegitimacy and that the best thing to do was to eliminate as many distinctions as

possible while retaining the status. We have concluded, however, that the best way to eliminate the distinction is to adopt legislation declaring all children to be equal, and we recommend the adoption of such legislation. A declaration of equal status will remove all need to refer to or to think of legitimacy and illegitimacy insofar as the law in concerned; it will give equal treatment to all children; and in time it may help to reduce social as well as legal distinctions. In so saying we postpone for the moment discussion of the personal relationships between the child and his parents and of questions relating to the method and time of ascertainment of paternity.

RECOMMENDATION #1

(1) That the status and the rights and obligations of a child born out of wedlock be the same as if the child were born in wedlock.

(2) That save as provided in our Recommendations the status and the rights and obligations of the parents and all kindred of a child born out of wedlock be the same as if the child were born in wedlock.

(3) Subsection (2) does not affect the status, rights or obligations of the parents as between themselves.

(4) That this Recommendation apply for all purposes of the law of Alberta notwithstanding any other Act.

RECOMMENDATION #2

(1) That "child" be defined in the proposed Act to include a person who has attained his majority.

(2) That "child born in wedlock" and "child born out of wedlock" be defined in the proposed Act as follows:

"child born in wedlock" means a child whose

parents were married to each other when the child was conceived or born or between those times and "child born out of wedlock" means any other child.

(3) That "marriage" and "married" be defined for the proposed Act as follows:

"marriage" includes a void or voidable marriage and "married" has a corresponding meaning.

The Legitimacy Act legitimates children born or conceived of all voidable marriages and children born or conceived of most void marriages. The recommendation we have made removes the distinction between legitimate and illegitimate children. The Legitimacy Act will become unnecessary, and indeed contrary to the pattern of our recommendations, and should be repealed.

RECOMMENDATION #3

That the Legitimacy Act be repealed.

2. Presumption of Paternity

The law presumes until the contrary is proved that the husband of a married woman is the father of her child; that is a presumption of fact upon the basis of which the law confers the legal status of legitimacy upon the child. We think that the law should also presume until the contrary is proved that a man who cohabits with the mother of a child throughout the year before the child's birth is the father of the child. Cohabitation throughout that period, though out of wedlock, makes it likely that the man is the father in much the same way as does cohabitation in wedlock.

A man may be registered as the father of a child at the joint request of himself and the mother. We think that the

concurrent statement of the two makes it likely that the man is the father of the child, and indeed under sections 3 and 34 of the Vital Statistics Act it is prima facie evidence unless it affects legitimacy. This reasoning applies equally to registration under the Alberta Vital Statistics Act and to registration under a similar provision of the corresponding statute of another jurisdiction. Paternity should therefore be presumed until the contrary is proved, but in the absence of cohabitation throughout the preceding year we do not think that the father should have the rights of a guardian unless they are granted by a court.

Since Report 20 was issued, legislation in other Canadian jurisdictions has added an additional presumption of paternity which we think should be adopted. It is that a man is presumed to be the father of a child if he marries the child's mother after the child's birth and acknowledges that he is the child's father. In our opinion these circumstances establish a likelihood of paternity and makes it desirable that the man be presumed to be the father. We have amended Recommendation 4 to provide a presumption of paternity in such cases, and we have amended Recommendation 6 to provide for the presumed father's guardianship.

Some other Canadian provincial legislation has added two classes of cases in which presumptions of paternity apply. One, which is included in the Uniform Child Status Act, is that any acknowledgement in writing by a child's mother and a man that the man is the father would give rise to the presumption. However, a presumption of parentage will affect the vital interests of the

alleged parents and the child and others as well, and we therefore think that an acknowledgement should not give rise to a presumption unless it is made formally in the context of a formal act relating to parentage, that is to say, registration under the Vital Statistics Act. We have not amended our recommendations to provide for a presumption of paternity in such cases.

The second additional class of case in which some provinces have created presumptions of paternity is cases in which a court of competent jurisdiction has, during a man's lifetime, found him to be the father of a child. The suggestion that once a court has decided something another court should not have to decide it again is attractive. However, such a decision can be made in proceedings to which the child, the mother or the alleged father is not a party or which are not understood by the parties to have such far reaching consequences. A later recommendation in this report (Recommendation 32) is that proceedings for declarations of parentage should be brought in the Court of Queen's Bench, and we think that formal proceedings of that kind are a desirable protection for everyone concerned. We have not amended our recommendations to provide for a presumption of paternity by reason of a finding by a court other than the Court of Queen's Bench.

At least one jurisdiction has provided that where presumptions of parentage conflict there is no presumption. We prefer to let the conflicting presumptions stand until a court makes a decision between them. It would no doubt be unfortunate if, say, the mother's husband and the man who cohabited with the mother were both to assert rights as a child's father. However,

we think that it would be even more unfortunate if neither could do so. There will, we think, be many cases in which conflicting presumptions arise but in which only one will be asserted for the very good reason that that is the one which is true. In the example which we have mentioned, we think that the man who lives with the mother, and particularly the man who afterwards marries the mother and acknowledges the paternity of the child, should be able to act as the child's father without the necessity of going off to court to get a declaration of paternity. We think that family life should go on as much as possible without litigation in court over parentage, and presumptions of parentage will help to achieve that result. If the question of paternity does come before a court and there are conflicting presumptions, we expect that the court would make a decision on the balance of probabilities.

We think that the presumptions arising from marriage, from cohabitation and from joint registration should be brought together in one place, and we recommend accordingly.

There is no point in framing a presumption of maternity: it is absurd merely to presume what must be true, that is, that a child born to a woman is that woman's child.

RECOMMENDATION #4

> *That until the contrary is proved by a balance of probabilities a man be presumed to be the father of a child if*
>
> *(i) at the time of the conception or birth of the child or between those times he is married to the child's mother;*
>
> *(ii) he cohabits with the child's mother throughout the year preceding the*

child's birth;

(iii) he marries the mother of the child after the birth of the child and acknowledges that he is the father of the child; or

(iv) he is registered as the father of the child under the Vital Statistics Act or under a similar provision of the corresponding statute of another jurisdiction at the joint request of himself and the child's mother.

3. Guardianship Arising from Parentage

Guardianship as we use the term is the total bundle of rights and duties which a parent or other adult may exercise in relating to the upbringing of a child. It includes among other things custody, control over education and religion, control over the child's name and control over the child's right to marry.

We have said that children should be treated equally. The parents of a child born in wedlock are joint guardians of a child. Should the law, in order to give equal treatment to the child born out of wedlock, provide that his parents are joint guardians?

A child is necessarily dependent and must look to adults for the fulfilment of his material and emotional needs. Our society imposes upon the parents of a child born in wedlock the obligation of seeing to the fulfilment of those needs and of bringing up the child; and it confers upon the parents the rights and powers which are necessary to enable them to do so and which are to be exercised in the child's interest. If they fail to exercise their rights and powers in the child's interest, the child may be removed from their care and committed to the care of others; and if the father and mother cannot agree between

themselves the law provides for an adjudication based on the best interest of the child. Our answer to the question we have put is that the rights and powers of a parent or guardian should be conferred in the best interest of a child. That answer however raises questions as to what is in the best interest of children born out of wedlock, and we turn to a discussion of the circumstances that must be considered in order that that interest may be identified.

It is, we think, a fact that the biological relationship between parent and child is a binding force in our society, and that as a general rule it is better for a child to be brought up by his biological parents than by others in their stead. However, a biological parent may abuse his position, or abandon or deny his responsibility. Indeed, it may be evident" by reason of some act, condition or circumstance" affecting the natural parents "that the welfare of the child requires that that fundamental natural relation be severed" (Hepton v. Maat, [1957] S.C.R. 606, per Rand J. at 607). Where there is competition between adults for the right to bring up the child, the test of doing what is in the best interest of the child calls for the weighing of all relevant factors, of which biology is but one; and we endorse the application of that test. There are no clear-cut guidelines as to the weight to be attached to one factor or another. What is important is the balancing of all relevant factors, which may include:

(1) the child's blood relationships and racial-cultural heritage, and established familial or other social relationships;

(2) the preference, having regard to the child's age, sex, previous experiences and circumstances generally, to be given to continuity of established relationships, and the effect of change on the child;

(3) the love and affection shown by competing parties for the child and its value in terms of the child's emotional growth;

(4) the stability and permanency of the homes which competing parties offer;

(5) the abilities of competing parties to provide for the child's physical and mental well-being;

(6) the moral fitness of competing parties as demonstrated by their character and conduct, and its effect on the child; and

(7) the wishes of the child.

Where does that lead us? Firstly, it is in the best interest of the child that someone should be responsible for the care and upbringing automatically from birth. The indisputable bond with the woman who bears the child makes her an obvious person to carry that responsibility in most cases. The mother is there while the father may not be. Bearing the child is more likely to result in an attachment to it than is assisting in its conception. The only other choice, in the absence of a concerned father, is the state, and if the mother is not concerned she will probably give the child up to the state anyway. In our view, the law now gives proper effect to the best interest of the child by placing the child and mother in full legal relationship automatically from birth.

We further believe that it is in the best interest of a child to be raised by two parents, a mother and a father. This belief recognizes the family as the basic group in our society, and is borne out by the social sciences and by the existing law applicable to children born in wedlock. The law should therefore recognize a child's familial relationship with his biological father, alongside his mother, where such a relationship exists in fact or where the father properly wants to commence one.

We think that cohabitation between the mother and father throughout the year before the birth of a child being born out of wedlock is likely to result in an environment which, to the child, is much the same as if the mother and father were married. The same is true if the father marries the mother and acknowledges that he is the natural father of the child. We accordingly recommend that in either of these cases the father be recognized as a joint guardian. The presumption of paternity arising from the same facts would then become a presumption of parentage with guardianship.

A presumption of parentage with guardianship would take effect at birth of the child, and the presumed father would be able to act upon the presumption unless and until the fact of parentage is disproved before a court. The presumption would give rise to the full range of rights and duties which attach to the legal relationship of a child born in wedlock and his parents under the existing law. Most important the father would have the right, as a guardian, to participate in the upbringing of the child. Where a factual relationship which raises a presumption of parentage is present, we are prepared to assume that the

benefits of the presumption outweigh the risk of adverse social consequences to the child, and that the child's best interest will be served by a full legal relationship, including both parental rights and responsibilities, with his father and his mother. A presumed father who ceases to live with the mother should nevertheless continue to be a guardian with parental authority. Any problems arising from the joint guardianship of the father and mother would be resolved in court proceedings as they now are when a parent ceases to meet the standard of responsibility required of a guardian. Our proposed Act would deal in this respect with all children, whether born in or out of wedlock and would replace section 39 of the Domestic Relations Act.

Since Report 20 was issued, the new Child Welfare Act has conferred upon the Provincial Court in some circumstances jurisdiction to appoint guardians. Under s. 53 the Court may appoint as a guardian any adult who has had the continuous care of a child for a period of more than six months. Under s. 34(3), if it appoints the Children's Guardian as permanent guardian of a child, the Court may appoint as a joint guardian a person who has had a significant and continuing relationship with the child. A father who is not married to the mother but has the appropriate qualification may take advantage of these provisions.

The relationship between the guardianship provisions of the Child Welfare Act and the Domestic Relations Act is already somewhat complex. Under s. 50 of the Domestic Relations Act any person can apply for guardianship of a child who has no guardian or whose guardian is not a fit and proper person to have

guardianship. Under the Child Welfare Act an adult, including an unmarried father, who has had the continuous care of the child for a period of more than six months may apply for private guardianship. Under the legislation which we propose, the mother and a presumed father would be guardians of the child unless the court otherwise orders, and an unmarried father who is not a presumed father would be entitled to apply to the Court of Queen's Bench for a declaration of parentage and for guardianship. Some different organization of the legislation might be desirable, but we do not think that it would serve any useful purpose for us to make any suggestions to that end until our recommendations are accepted in principle.

Section 11 of the Child Welfare Act provides that if the unmarried mother of a newborn child enters into a permanent guardianship agreement under which the Children's Guardian will assume the guardianship of the child, the father, within ten days of the birth of the child, may apply for an order terminating the agreement. The Provincial Court has jurisdiction to declare the father to be a a parent and to appoint him a guardian if he is willing and able to assume the responsibilities of guardianship and if it is in the best interests of the child that he be appointed guardian. The court may also give him custody. This is very similar to the recommendations for a declaration of parentage with guardianship which we will make below. It is, however, to be done in the Provincial Court. We do not recommend a change in this provision. A summary procedure is needed so that the child may be placed either with the father or with adopting parents, and the Provincial Court's declaration would allow the placement to be made. It would not have the same

general application as the declaration of the Court of Queen's Bench to which we will now turn.

RECOMMENDATION #5

(1) *That "guardianship" and "guardian" be defined for the proposed Act as follows:*

"Guardianship" means guardianship of the person of a minor child and includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the right to exercise all powers conferred by law upon the parent or guardian of a child, and "guardian" means a person with guardianship.

(2) *That unless a court of competent jurisdiction otherwise orders, the following be joint guardians of a minor child:*

(i) *the mother of the child, and*

(ii) *a person who is presumed under Recommendation #4 to be the father of the child by reason of marriage to or cohabitation with the mother or because he marries the mother and acknowledges that he is the father of the child.*

(3) *That section 47 of the Domestic Relations Act be repealed.*

4. Declaration of Parentage

(1) Application for a Declaration of Parentage

The best interest of children does not call for a presumption of parentage with guardianship unless the parents are married or living together in a stable relationship; nor, in our opinion, is a biological relationship without more sufficient to give a father the rights of a guardian over the upbringing of his child. The greater proportion of unmarried fathers who are not interested in the welfare of their children justifies a

distinction between married and unmarried fathers where there is no stable relationship between the father and the mother. However, apart from guardianship, once the biological fact of paternity has been established, all the rights and obligations of the child and his kindred should be determined as if a child were born in wedlock.

There should therefore be provision for the bringing of an application before the Court of Queen's Bench for a declaration of parentage to establish paternity whenever the child, or the alleged parent against whom the application is brought, is resident in Alberta. Provided that jurisdictional requirement has been met, the declaration should be available after the birth of the child to the child or, if he is a minor, to any person acting on the child's behalf, and to any man claiming to be the father of the child. The declaration should also be available to any man alleging himself to be the father of an unborn child for the purpose of establishing his relationship to the child from the moment of birth.

The application for a declaration of parentage will usually be brought to establish the relationship of the father and child. It should, however, also be available in any case in which maternity is in issue.

RECOMMENDATION #6

(1) That a person claiming to be the father, mother or child of another person or the father of an unborn child be entitled to apply to the Court of Queen's Bench for a declaration of parentage.

(2) That the court have jurisdiction to make a declaration of parentage if the child or

alleged parent against whom an application is brought is resident in Alberta.

(3) That the court be required to grant a declaration of parentage upon being satisfied that the alleged father or mother is the father or mother of the child or unborn child.

(4) That any person acting on behalf of the child be entitled to make the application.

(2) Notice of Application for Declaration

An application for a declaration of parentage carries with it implications as to succession to property and as to the right to be a guardian or to apply for guardianship which are of great importance to the child and his parents and may be of great importance to others. The proposed Act should, as far as possible, ensure that all persons with a proper interest receive notice of the application.

RECOMMENDATION #7

(1) That unless the court otherwise directs, notice of an application for a declaration of parentage shall be given to

(i) the person claimed to be a child or any person named by law to be served on his behalf;

(ii) the guardian and the trustee of a dependant adult, or in the absence of a guardian or trustee, the Public Guardian or the Public Trustee;

(iii) any other person claiming to be a parent.

(2) That upon the application the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(3) Effect of a Declaration of Parentage

We have given much consideration to the question whether a declaration of parentage should establish the parentage of the child for all purposes and for all time. An affirmative answer is attractive: it would obviously be very unfortunate if a child were to be told at one time that his father is one man and at another time that it is another man, and it is desirable that his position be placed beyond doubt. There are, however, other considerations. The relationship of a child to a parent may establish his own or someone else's claim to inherit property, and it seems wrong that the interests of strangers to the proceeding should be created or destroyed by it, especially because the proceeding may take place at a time when its subsequent importance to others may not be foreseen. Further, the evidence upon which the declaration is made may be found to have been perjured or mistaken, or conclusive new evidence may be discovered, and the usual arguments in favour of the finality of decisions do not outweigh the harm which would be done if the law should obstinately continue to declare that one man is the child's father after it has been conclusively shown that another is the father. A declaration which establishes paternity is not like a divorce decree: it determines the existence of a relationship and does not change a status by its own force.

We think that the best balance is to provide that until the contrary is proved a man or woman named in a declaration of parentage is presumed to be the parent of the child, that is to say, that a declaration of parentage should take effect as a presumption of parentage while it remains in force unless the

court orders otherwise. The law should go on to provide for the setting aside of a declaration. We expect that a declaration solemnly pronounced after a formal proceeduing will rarely be set aside, but the possibility will be there to prevent a continuing and very grave injustice in case of error. The application should require leave of the court.

If the declaration is set aside in proceedings between the same parties, the court should have power to cancel future obligations which would otherwise arise under the first, and the presumptive effect of the first should be terminated; proceedings between other parties should not affect the original declaration. The setting aside of a declaration of parentage should not in any event upset rights which have vested under it or allow recovery of payments made or property transferred under it.

RECOMMENDATION #8

(1) *That until the contrary is proved a man or woman be presumed to be the parent of a child if he or she is named as a parent in a subsisting declaration of parentage under Recommendation #6.*

(2) *That the granting of a declaration of parentage with or without guardianship terminate a presumption under Recommendation #4.*

RECOMMENDATION #9

(1) *That a declaration of parentage remain in force until it is set aside under this Recommendation.*

(2) *That an application to set aside a declaration of parentage may with leave of the court be made to the court by which the declaration was made.*

(3) *That notice of the application be required to be given in the manner prescribed by*

Recommendation #7.

(4) That the court be empowered to confirm the declaration of parentage or set it aside.

(5) That the setting aside of a declaration of parentage not affect rights which vested while the declaration was in force.

(4) Declaration of Parentage with Guardianship

As we have already stated, the law should encourage the development of a meaningful social relationship between a father and his child born out of wedlock. The father should be able to take steps to transpose that social relationship into a legal relationship involving guardianship of a minor child; and he should be able to commence a relationship where one does not already exist. His ability to do so is particularly important if there is not a satisfactory relationship between the child and the mother but should not necessarily be restricted to such cases.

To this end we recommend that a father who is not a guardian under our earlier recommendations be entitled to apply for guardianship along with or after a successful application for a declaration of parentage. He will take that step if he wishes to assume the parental role and acquire legal rights and powers of a parent, including custody and control and the right to make decisions to the care and upbringing of the child. The court would then have an opportunity to look at the child in his immediate environment, and to assess the role which the father plays or might play and the effect of that role on the growth and maturation of the child before deciding whether it is in the best interest of the child that the father should be given the rights

of a guardian. Upon making an affirmative decision the court would grant a declaration of parentage with guardianship and the father would become a guardian.

Cases are different, as we have said before: the child may participate in a highly developed and meaningful association with his father. He may just see his father casually or know who he is but not see him at all. He may not even know who his father is. The father may be a rapist. The child may be the product of an incestuous relationship. The child's mother and father may be on good or bad terms or something in between. We think that the court should evaluate the situation before rights of guardianship are conferred on the father. That is our first reason for requiring a court decision before a father who is not already a guardian by operation of a presumption of parentage is given the rights of a parent.

A second reason is that there is a danger that, if both parents have the powers of guardians, they will be in conflict with each other and that conflict may subject the child to undesirable stress. That is especially likely if the child's parents are living apart, and according to the statistics set out in Table I of Appendix I, unwed parents were not living together at the time of birth of the child in 59.16 to 82.26 per cent of the cases. The court should have an opportunity to decide whether there is danger of conflict between the mother and father. If the risks outweigh the likely gains the court will not grant rights of guardianship to the father.

As a safeguard to the child, we think that a director of Child Welfare should investigate each case in which an

application is made for guardianship with or after a declaration of parentage. The purpose of the investigation would be to provide information to assist the court to decide whether the applicant is ready, willing and able to undertake all of the obligations of parentage, including responsibility for the care and upbringing of the child. The director should be entitled to be present and make representations upon the application.

RECOMMENDATION #10

(1) *That if the child is respect of whom an application for a declaration of parentage is brought is a minor, the alleged parent may apply for a declaration of parentage with guardianship.*

(2) *That if the child is alleged to be a child born out of wedlock a director of child welfare:*

(i) *be given notice of an application for parentage with guardianship;*

(ii) *shall investigate the applicant's readiness, willingness and ability to undertake all of the obligations of parenthood including responsibility for the care of and upbringing of the child;*

(iii) *shall make a report of his investigation to the court; and*

(iv) *is entitled to be present and make representations upon the application.*

(3) *That upon or after the granting of a declaration of parentage and upon being satisfied that it is in the best interest of the child so to do the court may grant the declaration of parentage with guardianship.*

(4) *That a guardian named in a declaration of parentage with guardianship and any other guardian of the child be joint guardians.*

(5) Declaration Granting Restricted Guardianship

The court should have a discretion which would allow it to mould the authority of the parent as guardian to suit he circumstances, for example, by excepting one or more of the usual incidents of guardianship, most notably the right to the custody of the child.

RECOMMENDATION #11

(1) That in a declaration of parentage with guardianship the court be empowered to exclude any of the rights of guardianship.

(2) That at any time after it has made a declaration of parentage with or without guardianship the court upon application of a person described in Recommendation #6(1) or (3) and upon being satisfied that it is in the best interest of the child so to do be empowered to:

(i) revoke a right of guardianship granted by the declaration of parentage; or

(ii) confer guardianship if the declaration of parentage did not do so; or

(iii) vary the declaration as to the rights of guardianship granted or excluded by it.

(6) Declaration of Parentage with Access

Short of guardianship, the court should be empowered upon the making of a declaration of parentage to order that the father shall have the right of access to his child born out of wedlock. It is, of course, clear that the court would be able to refuse all rights of guardianship including access.

RECOMMENDATION #12

That upon the granting of a declaration of parentage without guardianship or at any time thereafter and upon being satisfied that it is in the best interest of the child so to do the court may grant access to the parent named in the

declaration.

VIII

APPLICATION OF PROPOSALS FOR REFORM: MATTERS AFFECTING THE CHILD PERSONALLY

The term "guardianship" as we use it and as we discuss it is the total bundle of rights and duties which a parent or other adult may exercise in relation to the upbringing of a child. We have provided for the application of the test of the best interest of the child to the appointment and removal of guardians of children born out of wedlock. It is now necessary to make specific recommendations relating to some of the incidents of guardianship.

1. Custody

Historically the Supreme Court of Alberta acting as parens patriae has had jurisdiction over the custody of children. That jurisdiction has been partially codified by sections 55, 56 and 57 of the Domestic Relations Act. McDonald J. held in Nelson v. Findlay & Findlay, [1974] 4 W.W.R. 272 (Alta. S.C.) that either the mother or father of an infant born out of wedlock may apply for custody under section 46 and we agree that that is what the law should be so long as the parent is a guardian under our previous recommendations, but not otherwise. The jurisdiction of the Provincial Court to award custody to the father of an illegitimate child under section 32(1) of the Provincial Court Act having been confirmed by the Court of Appeal in W.D. v. G.P. (1984) 41 R.F.L. (2d) 229, either the mother or father may apply under that section.

We think that there should be no power to award custody to a parent of a child born out of wedlock unless that parent is a guardian. If a personal relationship is in the best interest of the child, the parent should apply for and obtain guardianship; if it is not, he should not have custody.

RECOMMENDATION #13

(1) That the Domestic Relations Act be amended as follows:

(i) as to subsection (1) of section 55, by inserting after the word "parents" the words "each of whom is a guardian" and by substituting the words "the children of whom they are the parents" for the words "the children of the marriage"; and

(ii) by adding a new subsection after subsection (5) of section 56 as follows:

(6) This section applies whether the minor is born in or out of wedlock but does not empower the court to grant custody of or access to the minor to a parent who is not a guardian of the minor.

(2) That the Provincial Court Act be amended by adding a new subsection after subsection 1 of section 32 as follows:

(1.1) Subsection 1 applies whether the child is born in or out of wedlock but does not empower the court to grant custody of or access to the child to a parent who is not a guardian of the child.

2. Access

The right of access is the right to visit a child who is in the custody of another person. Both the Court of Queen's Bench and the Provincial Court have jurisdiction to award access

regardless of the birth status of the child.

What we have said about the power to grant custody applies to the power to grant access. We think that both courts should have the latter power, but that access should not be granted to a parent who is not a guardian. Recommendation #13 covers the situation and no further Recommendation is necessary.

3. Name

(1) Birth Registration

Under the Vital Statistics Act a legitimate child is normally registered in the surname of the father although, at the joint request of the parents, he may be registered in the surname of the father hyphenated or combined with that of the mother. An illegitimate child is normally registered in the surname of the mother though a father and mother who are not married to each other may jointly request registration in the surname of the father or in their hyphenated or combined names.

We recommend that the father and mother should continue to be able to agree on the registration of their child born out of wedlock in the father's surname or in a hyphenated or combined name. We further recommend that upon the granting of a declaration of parentage with guardianship the court, which will be acting in the best interest of the child in making the order, should be required to make an order as to surname, and that the birth register should be amended in accordance with any order so made and registered. Recommendations which we will make later in this Report will allow either parent to apply for a change of the child's surname with the consent of the other. If in a given

case none of these procedures will result in the child being registered in the father's surname, it will almost invariably follow that there is little or no social relationship between the child and his father and that it is therefore not in the best interest of the child to bear his father's surname.

We say again here that our Recommendations are not based upon any value judgment relating to the so-called common law marriage. Our exclusive concern is the best interest of the child born out of wedlock which we think is best served by giving him in relation to his parents the rights of a child born in wedlock.

A minor amendment should be made to the Vital Statistics Act as a result of our principal Recommendation eliminating the distinction between legitimate and illegitimate children. Section 5, which provides for a change of registration of a child on legitimation, will become pointless and should be repealed.

RECOMMENDATION #14

That in a declaration of parentage with guardianship the court be required to provide for the surname by which the child is to be known.

RECOMMENDATION #15

(1) That subsection (3) of section 3 of the Vital Statistics Act be amended by substituting the words "child born out of wedlock" for "illegitimate child".

(2) That the following subsection be added after subsection (13) of section 3 of the Vital Statistics Act:

(14) Upon receipt of a declaration of parentage with guardianship giving directions as to a child's surname the

Director shall amend the registration in accordance with the order by making the necessary notation in the register.

(3) That section 5 of the Vital Statistics Act be repealed.

(2) Change of Name

The Change of Name Act allows the mother of a child born out of wedlock to apply to change the child's given names and, with some restrictions as to the names which may be chosen, his surname as well. The father, unless he is a guardian, has no similar right to apply for a change of the child's name, and the father's consent is not required on the mother's application. We think that if there is an actual relationship between the father and the child, the father should be able to apply as can the father of a legitimate child; and also that, as in the case of a legitimate child, his consent should be required to a change of name on the application of the mother or a guardian, though we will leave our formal recommendation on that point until Section X of this report dealing with notice and consent generally. The cases in which the father should have these rights are cases in which there is a presumption or declaration of parentage with guardianship or registration of the man as the child's father at the joint request of himself and the mother. Our Recommendation will require that the presumption or declaration be established by the filing of an affidavit or of the declaration with the Director of Vital Statistics under a procedure which we will recommend in Section X of this Report.

RECOMMENDATION #16

(1) That the Change of Name Act be amended by

Inserting a new section 10.1 after 10:

10.1(1) This section applies if a person is named as father of a child born out of wedlock in an affidavit or a declaration filed with the Director of Vital Statistics under the proposed Status of Children Act of parentage with guardianship or by registration under the Vital Statistics Act at the joint request of himself and the mother of the child.

(2) The mother or the father may apply to change a given name or the surname of the child.

(2) That section 11 of the Change of Name Act be amended by renumbering subsections (1) to (5) inclusive as subsections (2) to (6) inclusive and by inserting a new subsection (1) as follows:

11(1) This section applies to cases not referred to in section 10.1.

4. Education

One of the most cherished and important incidents of parenthood is the right to make decisions concerning the education of one's child. The School Act requires the attendance at school of "every child who has attained the age of six years at school opening date and who has not attained the age of sixteen years" unless excused for any of the reasons allowed by the Act; and permits attendance up to the age of eighteen years (s. 141). Parents are mentioned in several contexts: the school the child attends (ss. 144 and 151); the payment of fees, including tuition and transportation fees (ss. 151, 152, 154 and 165); provision of transportation (ss. 165 and 166); suspension or expulsion of a pupil (s. 155); instruction of a pupil in French or any other language (s. 159); exclusion of a pupil from

religious or patriotic exercises or instruction (s. 163); attendance of a pupil on a work experience program (s. 170); and contravention of school attendance provisions (s. 180). "Parent" is defined in section 1(i) to include:

> (i) a person appointed as guardian under Part 7 of the Domestic Relations Act,
>
> (ii) the Director of Child Welfare, with respect to a child who is a ward of the Crown within the meaning of the Child Welfare Act, and
>
> (iii) any other person who completely maintains supports and controls a child as a parent would.

We think that it would be desirable to change the definition of "parent" so that it would clearly include the father of a child born out of wedlock if the father is a guardian.

RECOMMENDATION #17

> *That the School Act be amended by substituting the following for subclause (i) of subparagraph (i) of section 1:*
>
> *(i) a person who is a guardian under the Status of Children Act or who is appointed a guardian under Part 7 or the Domestic Relations Act.*

5. Religion

Another cherished and important right is that of a parent, as guardian, to determine the religious education of his child. This right may be overridden by the court in the exercise of its equitable jurisdiction where the wishes of the parent conflict with the welfare of the child (DeLaurier v. Jackson, [1934] S.C.R. 149).

Under our previous recommendations, an unwed father who has the benefit of a presumption or declaration of parentage with guardianship will have the right to make or take part in the decision. He will also be a "parent or other responsible person" under section 60 of the Domestic Relations Act so that if he fails to obtain custody of the child the court will have power to deal with the child's religious upbringing in the same way as it can deal with that of a child born in wedlock. We do not make any further recommendation here.

6. Marriage

With the exception of a girl who is pregnant or the mother of a living child, a person under the age of sixteen years is not permitted to marry (the Marriage Act, s. 16). Certain consents (s. 18), in most cases the consents of the mother and father, must be given to the marriage of any person under eighteen years of age. Where the parents are divorced or separated, the person having legal custody may give the consent.

We will in Section X consider in what circumstances the consent of an unwed father should be required and make our recommendation there.

7. Testamentary Guardianship

A parent of a child may by deed or will appoint a person to be guardian of the child after the parent's death (Domestic Relations Act, s. 48(1)). We recommend that an unwed father should be a "parent" for the purpose of this section if he himself is a guardian pursuant to a presumption of declaration of parentage with guardianship.

RECOMMENDATION #18

That the father of a child born out of wedlock be entitled to appoint a guardian under section 48(1) of the Domestic Relations Act, but only if he is a guardian of the child.

8. Management of Property

Our proposals relate to the guardianship of a child's person and not to guardianship of his property. Under section 4(h) of the Public Trustee Act, the Public Trustee is the guardian of the child's estate unless letters of guardianship have been issued by the court, and we do not see anything in the law relating to letters of guardianship which require correction in the special case of the child born out of wedlock. The Minor's Property Act also deals with the property of children, but it already appears broad enough to allow the father of a child born out of wedlock to make applications to the court in respect of the management of property owned by his child. We make no recommendations here.

9. Alternatives to Parental Guardianship

Guardianship of the Children's Guardian and adoption offer alternatives to parental guardianship in the upbringing of children. We will deal with the question of the involvement of the unwed father in these proceedings in Section X.

10. Best Interest of the Child and Parental Preference

We have considered the question whether or not the law should express or exclude a preference for one parent over the other in matters relating to the upbringing of the child. We have concluded that the legislation should not interfere with the

application of the test of the best interest of the child and should remain silent on the question.

IX

APPLICATION OF PROPOSALS FOR REFORM: FINANCIAL MATTERS AFFECTING CHILD

In this section, we will deal with the provision of financial maintenance for a child born out of wedlock. We will also look at his reciprocal financial obligation to maintain family members. Then, under the heading of "Disposition of Property", we will examine the position of a child upon an intestacy or under a will or trust. The existing law distinguishes persons on the basis of their legitimacy or illegitimacy for all of these purposes.

1. Maintenance

(1) During the Parents' Lifetime

We begin our discussion of maintenance with a description of the existing law. All children under the age of sixteen years have the right to be maintained by their parents (Maintenance Order Act, s. 3(2); Maintenance and Recovery Act, s. 21(1)(b)). An illegitimate child may be required to be maintained until he "attains the age of 18 years if he is attending school or is mentally or physically incapable of earning his own living" (Maintenance and Recovery Act, s. 21(1)(b)). In the case of a legitimate child, the Domestic Relations Act (s. 46(5)) allows the court to make an order for the maintenance of an infant by the father or mother in conjunction with an application for custody, and infancy continues until majority; an illegitimate child is probably within this section (Nelson v. Findlay and Findlay, [1974] 4 W.W.R. 272 (Alta. S.C.); Smith v. Koch 1976 24

R.F.L. 155, (Alta. S.C.); Quintal v. Boucher 1978 30 R.F.L. 380 (Alta. Sur. Crt.).

The duty of the unwed father to maintain his child is not enforceable in normal circumstances unless a complaint is made against him within two years of the child's birth or within one year of an acknowledgement by the father (Maintenance and Recovery Act, s. 14(1)). In contrast, the duty of the father to maintain his legitimate child may be enforced at any time.

In addition, the Maintenance Order Act (s. 3(1)) imposes a duty on members of the family to maintain "every old, blind, lame, mentally deficient or impotent person", or "any other destitute person who is not able to work". This provision, which we understand is rarely if every used, will operate in favour of a legitimate child of any age, but the Act specifically excludes an illegitimate child. It means that a legitimate child has the right to be maintained by his grandparents in a proper case; he also has a reciprocal duty to maintain his parents or grandparents. An illegitimate child is not entitled to receive maintenance from his grandparents, nor does he have an obligation to maintain his parents or grandparents.

We think that the position of the child born out of wedlock should be brought into conformity with that of the child born in wedlock, except that he should not have a duty to maintain his unwed father or paternal grandparents unless the father's parentage has been established by a presumption or declaration of parentage with guardianship. The child's right to be supported should arise at all events but his obligation to provide support should only arise if the father has shown interest and if the

reciprocal rights and obligations of the father had been extended to him. Our previous recommendations would ensure that the Court of Queen's Bench would have the necessary power to order maintenance under section 56(5) of the Domestic Relations Act, and the only recommendations necessary at this time relate to the Maintenance Order Act.

RECOMMENDATION #19

(1) *That the following be substituted for section 1(a) of the Maintenance Order Act:*

(a) *"child" includes a child of a child, and the child of a husband or wife by a former marriage.*

(2) *That the following section be inserted after section 1 of the Maintenance Order Act:*

1.1(1) *This Act shall be read in conjunction with the Status of Children Act.*

(2) *Notwithstanding anything contained in this Act, a child is not obliged to provide maintenance for his father unless there is a presumption of paternity under section 4(1) of the Status of Children Act or a declaration of parentage with guardianship under section 5(3) of the said Act.*

We think that the equal treatment of the law should extend to the provision of one summary procedure by which maintenance can be secured for all children whether born in or out of wedlock. At the present time, an illegitimate child must ordinarily claim maintenance in a summary affiliation proceeding brought before the Court of Queen's Bench provided by Part 2 of the Maintenance and Recovery Act. The summary proceeding available to a legitimate child is before the Provincial Court under section 27 of the Domestic Relations Act. In trying to

bring the two proceedings ogether we find ourselves on the horns of a dilemma: we would have to recommend changes in the law relating to children born in wedlock in order to bring it into conformity with that relating to children born out of wedlock, or we would have to leave inequalities between children born in wedlock and children born out of wedlock. We are not prepared to adopt either course of action without a thorough study of the law relatig to the support of children generally, and we therefore propose to defer making a recommendation for one summary procedure until we report on the law relating to the support of children generally, a project upon which we have done only some preliminary work.

(2) After a Parent's Death

The Family Relief Act provides for the proper maintenance and support of a dependant child out of the estate of his deceased mother or father. An illegitimate child is eligible to claim support from the estate of his deceased mother, and no change in the law is needed. He is eligible to claim from the estate of his deceased father if the father has acknowledged his paternity, or has been declared to be the father in an affiliation proceeding under the Maintenance and Recovery Act or a predecessor Act. The principle of equal treatment suggests that eligibility should depend on the biological fact of paternity in the cases of children born out of wedlock as it does in the cases of children born in wedlock, and effect should be given to the principle to the extent that it does not expose estates to trumped-up claims, a subject which we will discuss in the section of this Report dealing with limitation periods

affecting the right to bring proceedings.

RECOMMENDATION #20

That the Family Relief Act be amended by substituting the following for section 1(b):

(b) "child" includes

(i) a child of a deceased born after the death of the deceased, and

(ii) a child born out of wedlock

(3) Maintenance-related Legislation

We have said above that some maintenance-related legislation already includes a child born out of wedlock. The Workers' Compensation Act and the Criminal Injuries Compensation Act do so. The Fatal Accidents Act gives a cause of action for damages for the benefit of the family of a person whose death was caused by wrongful act, neglect or default. A child born out of wedlock is included, but it is not clear at the present time whether his father may benefit under the Act. In other Acts, examples of which are given in Appendix II, words such as "parent" and "child" are not defined, leaving ambiguity in the case of a child born out of wedlock. Our Recommendation #1 will clear up all ambiguity in favour of including the child born out of wedlock in the term "child" and in favour of including the mother and father of the child born out of wedlock in the terms "mother", "father" and "parents". We think, however, to conform to our proposed Act by removing from them references to "illegitimate children".

RECOMMENDATION #21

(1) That paragraph (b) of subsection (1) of section 1 of the Criminal Injuries

Compensation Act be amended by deleting the words "an illegitimate child and".

(2) *That paragraph (a) of section 1 of the Fatal Accidents Act be amended by substituting the words "and stepdaughter" for the words "stepdaughter, and illegitimate child".*

(3) *That paragraph (c) of subsection (1) of section 1 of the Workers' Compensation Act be amended by deleting the words "a child born out of wedlock".*

2. Disposition of Property

(1) Intestate Succession

When a person dies without leaving a will directing distribution of his property, the Intestate Succession Act says who shall succeed to his estate and in what shares. Section 14 of the Intestate Succession Act says that a child born out of wedlock may not participate in the distribution of the estate of his deceased father unless the father leaves no widow or lawful issue and has acknowledged his paternity or has been declared to be the father in an affiliation proceeding. He may succeed to the estate of his mother and through her to the estate of a grandparent or other more remote maternal kindred because section 13 provides that "an illegitimate child shall be treated as if he were the legitimate child of his mother". A child born in wedlock may succeed both to and through the estates of his mother and his father and their kindred.

Should the limitation on the ability of a child born out of wedlock to succeed to the estate of his intestate father be perpetuated? Of course, if such a child is placed in the same position as his siblings who are born in wedlock, the effect will

be to diminish the shares of the latter, but we have already concluded that the rights of children should not depend on the marital status of their parents. We recommend that a child born out of wedlock be entitled to succeed both to and through the estate of his intestate father. This recommendation is subject to the limitation we will make in Section X as to the time within which paternity must be established.

A corollary issue is whether an unwed father, and more remote kindred through him, should be entitled to succeed to the estate of his child born out of wedlock. It is arguable that he should not be able to assert a claim to or through the estate of a child to whom he did not discharge the duties of a father during the child's lifetime. On the other hand, nowhere else in the law of succession does the right to succeed depend upon merit, and a requirement that a father must prove that he had fulfilled his obligations toward the child would create uncertainty and lead to litigation. One of our basic recommendations is that the status and rights and obligations of parents and kindred of a child born out of wedlock be the same as those of the parents and kindred of a child in wedlock, and we do not see a sufficient reason for departing from that recommendation merely because a father may lack merit.

RECOMMENDATION #22

That the Intestate Succession Act be amended as follows:

(1) *By substituting the following for section 1(b):*

1(b) "issue" includes all lineal descendants of the ancestor.

(2) By substituting the following for section 13:

> *13. For all purposes of this Act a child born out of wedlock is treated the same as a child born in wedlock.*

(3) By repealing section 14.

(2) Wills and Trusts

The doctrine of filius nullius at common law influenced the construction placed on words like "children" and "issue" where they appeared in wills and other instruments. The English House of Lords in Hill v. Crook (1873), L.R. 6 H.L. 265 held that such words refer prima facie to legitimate relationships and not to illegitimate ones. In the case of a child born out of wedlock and his mother, this rule of construction is reversed by section 36 of the Wills Act. It should be reversed for all cases by the proposed statute. Section 36 of the Wills Act would then be unnecessary.

We also recommend that the rule should be abolished for purposes of the interpretation of words denoting family relationships where used in deeds or other written instruments. This Recommendation would apply to the relationship of unwed mother or unwed father and child.

RECOMMENDATION #23

(1) That the rule of construction whereby in a will, deed or other instrument words of relationship signify only legitimate relationship in the absence of a contrary intention be abolished.

(2) That the Wills Act be amended by repealing section 36.

One final point is this: a somewhat uncertain rule of public policy prohibits gifts to future born illegitimate children. The existence of such a rule is at least partially rebutted by section 36 of the Wills Act which treats an illegitimate child as if he were the legitimate child of his mother. England has reversed the rule by section 15(7) of the Family Law Reform Act of 1969. The rule should be revoked and our general recommendation that the status and rights of a child born out of wedlock be the same as if the child were born in wedlock will revoke it. No further recommendation is necessary.

(3) Administration of Estates Act, section 7

A question arises as to entitlement to notice under section 7 of the Administration of Estates Act. That section requires a person applying for a grant of probate or administration to send to the spouse of the deceased and to each child or someone on his behalf a copy of the application and a notice pertaining to the rights of dependants under the Family Relief Act. If the child is an infant, a copy of the application goes to the Public Trustee. Such notice should be given whenever the relationship of the deceased to a dependant child born in or out of wedlock has been acknowledged by him, or established by presumption or by declaration or other court order establishing parentage before his death. We think, however, that the general law relating to the duty of executors and administrators to know of or make enquiries as to the existence of beneficiaries or potential beneficiaries should apply; we do not think that it is fair to executors and administrators to impose any special duty to carry on a special investigation to find out whether a deceased had any

children born out of wedlock.

(4) Protection of Legal Representatives and Trustees

A legal representative or trustee who has acted reasonably in the administration of an estate or the distribution of property should not be liable for claims based on the undisclosed relationship of an unwed father and his child. We think that the existing law gives him sufficient protection and we therefore make no recommendation for change.

(5) Wrongful Distribution

Property may be distributed in ignorance of the right of a child born out of wedlock to share in it. The next question is whether it should be possible to trace and reclaim it. The law which applies to other cases of wrongful distribution should apply and we make no recommendation.

(6) Retroactive Operation

It can be argued, and some members of our Board accept the argument, that the proposed Act should not apply to wills and other instruments executed before it commences; the proposed Act will change the rules of interpretation of words referring to family relationships and it may be that a testator or grantor used those words with the intention that they be interpreted according to the law as it was when he used them. The majority of our Board however believes that the proposed Act should apply to existing wills and instruments, though not so as to affect rights which have vested before its commencement; the proposals are intended to correct injustice, and it is much more likely

that a testator or grantor would use such words without directing his mind to the question whether or not they included illegitimate relationships. The law applicable to an intestacy would, of course, be the law in force at the death of the deceased person.

RECOMMENDATION #24

(1) That the proposed Act not affect rights vested before its commencement.

(2) That save as provided in subsection (1) the proposed Act apply to persons born and instruments executed before as well as after its commencement.

X

REQUIREMENTS OF NOTICE AND CONSENT

1. Introduction

The father of a child born in wedlock is entitled to notice of various kinds of acts and proceedings which would affect his rights as parent and guardian. It is implicit in the notion of one status for all children that a father who is a guardian of his child born out of wedlock should have notice of similar acts and proceedings. It is also implicit that the father of a child born out of wedlock should be able to give or withhold his consent to matters in which the father of a child born in wedlock would be able to do so unless as in cases of adoption and surrenders for adoption there are reasons to the contrary. We now turn to the question as to how a third party is to ascertain the identity of an unwed father. We also turn to the question whether the principle of serving the best interest of the child dictates that one should give notice to or obtain the consent of an unwed father who is not a guardian, to various matters affecting the child.

2. Identification and Location of Unwed Fathers

We address ourselves here to ways in which an unwed father might be identified and located. Later we will discuss the cases in which he should receive notice and in which his consent should be required.

(1) Unsatisfactory Alternatives

How is an unwed father to be located for the purpose of giving him notice of a proceeding or asking him for his consent to a matter affecting the child? The person who is under a duty to give the notice or ask for the consent must be able to identify and locate him, and the procedure should not be too onerous.

A court order declaring a man to be the father of a child born out of wedlock is authoritative evidence. However, the mere existence of an order does not bring it to the attention of persons who wish to identify and locate the father, and in the case of a presumption of parentage there is no court order at all. It is therefore not appropriate merely to say that notice is to be given or consent required if there is an order declaring a man to be the child's father.

As an alternative the law could provide for notice or consent if the unwed father had shown sufficient interest in the child to justify such a requirement. Conduct showing sufficient interest might include any or all of the following: a written or oral acknowledgement of paternity; living with or supporting the child; living with the mother at the time of the child's conception or having had a continuing relationship with her since that time; assumption of the social responsibilities of a father; and signing an agreement to support the child. A provision of that kind would have the advantage of associating paternal standing with paternal merit. It would, however, have the disadvantage that the person under the obligation of finding the unwed father would not necessarily know of the conduct nor of the identity or location of the father, and we do not recommend it.

Another alternative would be to allow a man to register himself unilaterally as the child's father. Such a provision would be open to abuse, and we do not recommend any provision for registration other than the existing one for registration at the joint request of the mother and father.

(2) Registration at Joint Request of Parents

Registration of a man as father at the joint request of the mother and himself will be sufficient under our proposals to raise a rebuttable presumption of parentage. It will provide a firm foundation for a requirement that the man receive notice of proceedings affecting the child, and we will make several recommendations to that effect in relation to specific proceedings. Since the system exists it is not necessary for us to make a recommendation for its creation.

(3) Register of Unwed Fathers

We come now to a proposal which we will recommend. It embodies the idea of a central register which can be searched by the person who has the duty to find the unwed father, and requires the father to take positive action, failing which he will not necessarily receive notice.

Our proposal is that the Director of Vital Statistics maintain a separate register in which an unwed father may file one of two documents. The first is a declaration of parentage of the kind contemplated by this report. The second is a form of affidavit in which the unwed father would swear to the fact giving rise to a presumption of paternity, namely, a year's cohabitation with the mother, and in which he would swear to his

belief that he is the child's father. In either case the unwed father would be required to supply the Director with enough information to identify the child in his records and with an address for service. Notice at the address would bind the father, so that it would be incumbent upon him to keep it up to date.

A man who files an affidavit in the proposed register will make it almost certain that he will have to bear at least the financial burdens of paternity, and he will gain only the right to receive notice and an opportunity to give or withhold a consent which the court will ultimately be able to dispense with. Since the burdens are substantial and the benefits, except to an interested father, are not substantial, we do not expect the filing of affidavits to be abused. However, we will make a recommendation under which a false one may be removed from the register.

We understand that the keeping of such a register would cause some administrative problems for the Director. We understand, however, that the problems could be overcome. We regard the proposal for the register as one of very great importance in the structure of the system we have proposed for improving the situation of children born out of wedlock, and we hope that the necessity for the necessary administrative effort can be accepted. We will refer back to this proposal in our ensuing discussion of the kinds of proceedings affecting children and unwed fathers in which notice should be given or consent sought.

The register should not be available for inspection by the world at large; on the contrary, disclosure of the information contained in the register should be given only to parties to any proceeding or proposed proceeding involving the child, or persons requiring the consent of an unwed father who is a guardian of the child, or as ordered by the court.

RECOMMENDATION #25

(1) That a person claiming to be a parent of a child born out of wedlock may file with the Director of Vital Statistics:

(i) a declaration of parentage or, in the case of a man who is presumed to be the father of a child by reason of cohabitation with the child's mother, an affidavit swearing that the deponent cohabited with the mother of the child throughout the year preceding the child's birth and swearing to the deponent's belief that he is the father of the child;

(ii) if not otherwise provided, the name, date of birth, place of birth and sex of the child and, if known, the birth registration of the child and the name of the other parent; and

(iii) his address for service within the province which he may from time to time change by notice in writing filed with the Director of Vital Statistics.

(2) That the Director of Vital Statistics shall maintain a register of declarations of parentage and affidavits filed under subsection (1) and shall provide the name and address of a person claiming to be a parent of the child to any party to a proceeding or proposed proceeding involving the child, and to any person requiring the consent of the parent to a matter affecting the child.

(3) That unless the court having jurisdiction over the subject matter of a proceeding otherwise orders, service of a notice by registered mail addressed to the last address for service filed with the Director of Vital Statistics is good and sufficient service.

(4) That except as provided in subsection (2) or by order of the court the existence or the contents of a declaration of parentage or affidavit filed under this section shall not be made public or disclosed to any person.

(5) That upon making a finding that a person filing an affidavit under subsection (1) is not the father of the child or did not cohabit with the child's mother as set forth in the affidavit the court may direct that the affidavit be removed from the register and the affidavit thenceforth shall be deemed not to have been filed.

(4) Summary

In summary, we think that the law should provide for the identification of the unwed father in three ways:

(i) registration of a declaration of parentage;

(ii) registration of an affidavit establishing cohabitation giving rise to a presumption of parentage;

(iii) registration of a man as a child's father at the joint request of the mother and himself.

When we come to the recommendations as to when the unwed father should receive notice, we will refer back to these recommendations. We will not recommend that the unwed father receive notice in all cases. In most cases we will go on to recommend that the court be given the power and the duty to consider whether any other person not already served should receive notice with a view to ensuring that everyone with a proper interest in a child's welfare would have an opportunity to appear.

3. Requirements of Notice and Consent

(1) Guardianship, Custody and Access

Having provided for the identification and location of the unwed father, we turn to the question when, as a matter of policy, he should be entitled to receive notice or give his consent. In our opinion, the best interest of children born out of wedlock would be served by giving notice of proceedings for guardianship, custody or access to an unwed father who can be identified by any one of the three means set out above, and we so recommend. Notice should also be given to any other person who, in the court's opinion should have the opportunity to be heard; we would expect that that would include anyone with a potential right to guardianship or custody.

An unwed father should have a right to notice of other proceedings affecting the upbringing of the child only if he is a guardian.

These proposals require amendments to the Provincial Court Act and the Domestic Relations Act.

RECOMMENDATION #26

(1) That the Provincial Court Act be amended by adding the following subsections after subsection (9) of section 32:

(10) If the child is born out of wedlock, notice of an application shall unless the court otherwise orders be given to a person named as the father of the child in a declaration of parentage or affidavit filed under the proposed Status of Children Act and to a person registered as the father of the child at the joint request of himself and the mother, or as ordered by the court.

(11) Upon the application the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(2) That the Domestic Relations Act be amended by inserting a new section 45.1 after section 45:

45.1 Upon any application under this Part or Part 5 which affects the guardianship or custody of or the right of access to a child born out of wedlock, the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(2) Adoptions and Other Child Welfare Act Proceedings

Report 20 dealt at some length with the position of the unwed father in "neglected child" proceedings under the Child Welfare Act as it then stood, and in adoption proceedings. That detailed discussion is now irrelevant because the 1984 Child Welfare Act substituted difference proceedings and embodied some more recent policy decisions.

The question for discussion then and now is what part an unwed father should be given a chance to take in things done under the Child Welfare Act. These include the making of agreements between guardians and directors of Child Welfare for "protective services", the making of agreements for the giving of custody to a director, and for the making of agreements between guardians and a director under which the Children's Guardian will assume guardianship of the child. They also include court proceedings for orders permitting a director of Child Welfare to

supply "protective services", apprehension of children who are in need of protective services, supervision orders, temporary and permanent guardianship orders naming the Children's Guardian as guardian, orders for secure treatment and adoption orders. (The Child Welfare Act also deals with private guardianship orders, but we have discussed these sufficiently already.) Generally speaking the Child Welfare Act recognizes the guardian as the person to make the agreements and to take part in the proceedings which we have listed. In some places a "foster parent" has some standing. In others a person who has had the care of a child for six months or a person with whom the child has a continuing relationship is referred to. Apart from the standing of an unwed father to apply within ten days of the child's birth for a declaration of paternity and order of guardianship and custody under section 11 of the Child Welfare Act, the unwed father, as such, has no right to notice of proceedings and has no standing in proceedings.

Under our earlier recommendations an unwed father would be a "guardian" if he had cohabited with the mother throughout the year before the birth of the child or if he afterwards married the mother and acknowledged the child. Unwed fathers in those categories would have the same rights and standing as married fathers.

In Report 20 we also recommended that in proceedings an unwed father should receive notice if he had filed a declaration of parentage or affidavit under our earlier recommendations or if he was registered as father with the consent of himself and the mother. In the case of adoptions we said this:

Should the father's consent be required if he is not a guardian, or should he at least receive notice of the voluntary surrender and be given an opportunity to apply for guardianship? He may or may not be interested in the welfare of the child. If he is not, giving notice will waste time to the detriment of the child. If he can be located, is interested and is given a hearing, it will still be open to the court to decide against him; even more time will have been wasted, and, indeed, the final decision may not be rendered until all appeals have been exhausted. In the meantime, a fostering or institutional arrangement will be needed for the care of the child. Whatever the outcome, there will be discontinuity in the child's custody. On the other hand, the court may decide in the father's favour, and we have given a number of good reasons to encourage the development of the relationship of a child with his biological parents.

We have consulted the Inter-Faculty Group on the Study of the Child, an inter-disciplinary group at the University of Alberta whose professional qualifications we respect. Their view, after anxious consideration and extensive debate, is that the chance of being adopted is more likely to be in the best interest of a child born out of wedlock than is the chance of a good relationship with his father. We have accepted their advice and abandoned our previous view which was in favour of requiring notice to the father in the case of a child who has reached the age of six months or more. Our recommendation accordingly is that there be no notice or consent provision relating to the father of a child born out of wedlock in the case of a voluntary surrender unless he is a guardian or is registered as the child's father at the joint request of himself and the mother.

That recommendation does not preclude the Director of child Welfare from making an investigation to determine whether the child's father can be found and whether guardianship by the father would be in the best interest of the child; and we hope that as a matter of policy he will make such an investigation. The Director should be able to defer acceptance of the voluntary surrender until he has made such an investigation and, if its results are affirmative, until he has afforded the father

> an opportunity to apply for a declaration of parentage with guardianship and the results of the application are known. While the present section 30 of the Child Welfare Act probably allows him to do that, we think that the matter should be put beyond doubt by amendment.

Generally speaking, the 1984 Child Welfare Act would be consistent with the recommendations which we made in Report 20 if it recognized unwed fathers as guardians in the situations in which we think that an unwed father should be a guardian. It would in any event be necessary to change the definition of "guardian" in the Child Welfare Act if our other recommendations were adopted, because the Child Welfare Act definition includes persons who are or are appointed guardians under the Domestic Relations Act, and s. 47 of that Act, which makes parents guardians, would be removed into the proposed Status of Children Act. The change could be effected simply by adding the name of the new statute to the Child Welfare Act definition.

There are three points in the recommendations which we made in Report 20 with which the Child Welfare Act would not be entirely consistent. The first of these is that a father who has filed an affidavit or declaration of parentage with the Child Welfare Branch and a father who is registered there with the joint consent of himself and his wife would, under our recommendations but not under the Child Welfare Act, receive notice of proceedings. The second is that our recommendations did not specifically provide a ten day period after the child's birth for application for a declaration of parentage and for guardianship by the unwed father of a newborn child. The third is that our recommendations would have given the Director of

Child Welfare a freer hand to look for unwed fathers and would have directed the court to give more consideration to serving others than immediate parties. We express no view on the second point. On the first and third, we remain of the opinion that our points are valid. However, in view of the fact that the Child Welfare Act is so recently enacted and embodies policy decisions made after much thought and discussion we have concluded that we should not repeat them in our recommendations in this report.

RECOMMENDATION #27

We recommend that the Child Welfare Act be amended to include in the definition of "guardian" a person who is or is appointed a guardian of the child under the Status of Children Act.

(4) Marriage

In addition to a parent The Marriage Act permits a person who has legal custody of a child under eighteen years of age to consent to the child's marriage. We do not think that any change is necessary.

(5) Change of Name

We have previously recommended (Recommendation #16) that a mother or father should be able to apply to change the name of a child born out of wedlock. We think, however, that the consent of the other parent should be required, and that in this case the requirement should not be restricted in the case of fathers to those who are guardians, as a child may be using the father's surname. The court should, however, have power to dispense with consent, and section 14(3) of the Change of Name Act should accordingly be amended so that the court can dispense with

consents required by the new section 10.1 which we proposed under Recommendation #16.

RECOMMENDATION #30

That the Change of Name Act 1973 be amended as follows:

(1) By adding to section 10.1 as proposed in Recommendation #16 the following subsection:

(3) The mother or father may not apply under this section without the consent of the other parent of the child.

(2) By inserting the number "10.1" after the number "10" in subsection (3) of section 14.

4. An Opportunity to be Heard

A person entitled to notice should be entitled to be heard. Even in cases where a person is not entitled to notice, the court has a discretion to hear him if he indicates his interest in the proceedings and asks to be heard. This discretion could be exercised in favour of an unwed father who has not been notified of proceedings relating to his child but learns of them. The power of the court to hear or add an interested party is referred to by Legg, D.C.J. in Re N.V.C., [1973] 5 W.W.R. 257 at 262:

> I can visualize cases in which it would be in the best interests of the child to have the putative father represented by counsel. I am of the opinion that a discretion lies in the court to allow the putative father or any other person to be represented and take part in the proceedings. The courts have exercised this discretion in other branches of the law, particularly in probate matters. However, the onus rests with the putative father to make application to the court to be heard and to be represented, and demonstrate to the court the reasons why it should exercise its discretion in his favour. Failing this, the putative father has no status before the court in wardship proceedings.

That discretion seems appropriate for cases where the unwed father is not entitled to notice.

5. Court Power to Dispense with Notice or Consent

The court should have power to dispense with notification or consent where it is unlikely to serve any useful purpose, or where delay is likely to be prejudicial to the child. The power is sufficiently provided by the individual Acts and no further recommendation is required.

XI

PROOF OF PARENTAGE

If paternity is important it is usually known and acknowledged, but it is nevertheless necessary to provide for proper procedures and a careful weighing of evidence in those cases in which it is disputed. We speak of proof of "parentage" in this section and not merely proof of "paternity" because, as we have said before, there can in theory be an issue as to the identity of the mother.

1. Existing Machinery for Proof of Paternity

Under the existing law, paternity may be in issue in three classes of proceedings. The first is "affiliation" proceedings under the Maintenance and Recovery Act which are undertaken for the sole purpose of imposing upon a man financial responsibility for the support of a child; these proceedings affect only those children whose parents are not married to each other. The second class is all other cases in which proof of paternity is collateral to some other issue such as a claim on behalf of the child against the father's estate or for support under the Domestic Relations Act, or the claim of the father to custody or guardianship of the child; these can affect children whether or not their parents are married. The third class is proceedings for a declaration of legitimacy; these are rare in Alberta if they occur at all and the declaration is available only to children whose parents are married and children who are legitimated by the Legitimacy Act.

Paternity is presumed if the mother is married; there is a common law presumption that the husband of a married woman is the father of her children, and the presumption, though rebuttable, establishes for all practical purposes the paternity of most children born of married parents. At present there is no similar presumption of paternity if the mother is not married even though there may have been a continuing cohabitation between herself and a man. The paternity of a child, however, is established for the purposes of the Family Relief Act and the Intestate Succession Act by the father's acknowledgement or by an affiliation order, and its establishment may be assisted for other purposes by the father's acknowledgement. The registration of the father under section 3 of the Vital Statistics Act at the request of himself and the mother provides prima facie evidence of paternity by virtue of section 32 and 34 of the Act unless legitimacy is involved.

2. Summary of Earlier Recommendations

We have recommended that the presumption of paternity relating to the children of married couples be extended to cases where a marriage proves void or voidable; voidable and some void marriages are now covered by the Legitimacy Act. We have recommended that the presumption be extended to cases in which the mother of a child born out of wedlock has cohabited with a man for a year prior to the birth of the child and cases in which a man is registered as the child's father at the joint request of himself and the mother. We have also recommended that a "declaration of parentage", which would involve proof of paternity, be available whether or not the child's parents are

married. We have expressed the opinion that there should be one summary procedure by which maintenance can be secured for all children, whether born in or out of wedlock, though we have deferred making a recommendation to that effect until we report on the law relating to the support of children generally

These recommendations should facilitate the establishment of the paternity of the child of unmarried parents.

We have considered other ways of facilitating proof of paternity. One would be to give greater effect to a man's admission or acknowledgement of paternity. We do not recommend such a course. An admission or acknowledgement involves the risk of being fixed with parental obligations and should be treated as evidence for as well as against the man making it. There is, however, a danger of false claims and we do not think that an unsupported admission or acknowledgement should constitute proof of paternity unless a court accepts it. The weight to be given to an admission or registration should be a matter for the court to decide.

While the provisions of the Vital Statistics Act relating to evidence are being considered it is appropriate to recommend the repeal of subsections (3) and (4) of section 34 which prevent registered documents from being used to affect a presumption of legitimacy; our previous recommendations do away with the distinction between children born in and out of wedlock.

RECOMMENDATION #31

(1) *That subsection (1) of section 34 of the Vital Statistics Act be amended by deleting the word "A" at the beginning of the*

subsection and substituting the words "Subject to subsection (1.1), a".

(2) That the following subsection be added after subsection (1) of section 34:

(1.1) Where the parentage of a child born out of wedlock is in issue, any certificate, certified copy or photographic print referred to in subsection (1) is admissible in any court in the Province as evidence of the facts certified to be recorded or recorded therein.

(3) That subsections (3) and (4) of section 34 be repealed.

3. Evidentiary Effect of a Finding of Paternity

We have recommended that a declaration of parentage gives rise to a presumption of parentage. The next question is whether a finding made by a court of competent jurisdiction in Canada in other formal proceedings should have the same effect. We think not. The declaration of parentage will be granted after formal proceedings in which all available evidence has been adduced and considered and it should be effective for all purposes. Other proceedings are likely to be brought for a narrower purpose which may or may not involve all of the interested persons and which may be dealt with by a summary procedure. We do recommend, however, that such a finding should be admissible in evidence in a later proceeding so that the second court would be able to accept it unless it could be explained away or effectively contradicted. Our recommendation applies to findings made after formal proceedings and findings made after summary proceedings but we think that it should be restricted to findings made by Courts in Canada.

RECOMMENDATION #32

That whenever the parentage of a child is in issue in a civil proceeding before a court in Alberta, the court

(i) shall have regard to any subsisting presumption of parentage under Recommendations #4 and #8(1).

(ii) shall admit as evidence an order or judgment of any court of competent jurisdiction in Canada which expressly or by implication determines the parentage of the child.

4. Burden of Proof

(1) Existing Law

Paternity need be proved only by a balance of probabilities, though a court will doubtless have regard to the gravity of the consequences flowing from the finding. However, if the effect of the finding would be to make a child illegitimate, the burden of proof is very heavy; the presumption of legitimacy can, it has been said, "only be rebutted by evidence that is unquestionably decisive to the contrary": Wikstrom v. Children's Aid Society of Winnipeg et al (1955), 16 W.W.R. 577 (Man. C.A.); and, while the Supreme Court of Canada in Smith v. Smith and Smedman, [1952] 2 S.C.R. 312 held that the civil standard applies to proof of adultery, Kirke Smith J. still found it possible to say that it must be proved beyond a reasonable doubt if the legitimacy of a child is affected: Loewen v. Loewen et al (1969), 68 W.W.R. 767 (B.C.S.C.). An extended separation of the parents may displace the presumption or cause it to be easily rebutted. Affiliation proceedings, despite their punitive nature, are governed by the ordinary civil standard of proof; section 18 of

the Maintenance and Recovery Act merely requires the judge to be satisfied as to paternity. Section 19, however, says that paternity in affiliation proceedings cannot be proved by the uncorroborated evidence of the child's mother.

The usual rules of evidence apply to proof of paternity. The rule in Russell v. Russell, [1924] A.C. 687 has been reversed by section 19 of the Maintenance and Recovery Act and section 5 of the Alberta Evidence Act, so that evidence of non-access can now be adduced to show that the child of a married woman is not the child of her husband. Section 7 of the Alberta Evidence Act protects a witness from having to answer a question tending to show that he or she has been guilty of adultery, but has been restricted by judicial interpretation to cases in which adultery is the central issue upon which relief depends: Dmytrash v. Chalifoux, [1975] 16 R.F.L. 88 (App. Div.); both the mother and putative father are therefore competent and compellable witnesses in affiliation proceedings and in other proceedings in which adultery is not directly in issue, and section 19(3) and 19(4) of the Maintenance and Recovery Act are not strictly necessary to make the father compellable. An admission of paternity is admissible against the father, but if made to persons in authority must be shown to be free and voluntary: Matheson v. Frederick, [1945] 2. W.W.R. 591 (App. Div.). We will deal with blood tests and other genetic evidence.

(2) Proposal

Proof of paternity should continue to be according to the civil standard, and we so recommend; that recommendation is in accordance with the existing law and does not require

legislation. Without commenting on the general policy of section 7 of the Evidence Act, we think that it should be amended so that where paternity is in issue there would be no privilege against questions tending to establish adultery; the importance of proving paternity overbears any policy upon which the privilege is based. We think also that admissions to persons of authority should be admissable in evidence without proof that they were made freely and voluntarily.

RECOMMENDATION #33

(1) *That the Alberta Evidence Act be amended by adding the following subsection after subsection (2) of section 7:*

> (3) *Subsection (1) does not apply to the determination in a civil proceeding of any issue involving the parentage of a child, but evidence given on any such issue tending to show the commission of adultery is inadmissible in any other civil proceeding or on any other issue in the same proceeding.*

(2) *That an admission of parentage be admissible in evidence in civil proceedings without proof that it is free and voluntary.*

5. Corroboration

(1) Existing Law

Section 19(1) of the Maintenance and Recovery Act prohibits the making of an affiliation order on the uncorroborated evidence of the mother. Corroboration can be founded upon a probability, though not upon a suspicion: Lucyk v. Clark, [1945] 1 W.W.R. 481 (Sask. C.A., per Mackenzie J.A.). Evidence may be treated as corroborative if it tends to show that the mother's evidence is probably true, or if it confirms some material particular which

tends to show that the man was the father (per Smith C.J.A. in Kuchera v. Menduk, [1970] 73 W.W.R. 508, 514 (App. Div.), quoting McGillivray J.A., in Re Children of Unmarried Parents Act; Munro v. Krause, [1931] 2 W.W.R. 685, 694). Evidence of opportunity for intercourse is not itself corroboration of the mother's evidence that intercourse occurred, but evidence of opportunity together with a continued affectionate association may be. If it can be shown that the putative father has lied or made contradictory statements about a material circumstance, that may be corroboration, even though the true answer would not have been; that also appears from Kuchera v. Menduk (1970), 73 W.W.R. 508 (App. Div.). An admission, or the acceptance of responsibility for the child, may be corroboration, and in Workun v. Nelson (1958), 26 W.W.R. 600 the Appellate Division accepted as corroboration admissions contained in unsigned letters which were identified as the putative father's only by the mother's evidence.

There is no requirement of corroboration of evidence as to paternity in proceedings other than affiliation proceedings.

(2) Proposal

In Report 20 we recommended that there be a requirement of corroboration in proceedings for maintenance against a father. Indeed, we recommended that the requirement apply wherever paternity is in issue. One of our reasons was that if decisions about paternity were to depend upon one word being taken against another false claims and extortion would be encouraged. A second was that the estate of a deceased man would have no way to defend itself against such a claim. However, in our Report 37B,

Evidence and Related Subjects: Specific Proposals for Alberta Legislation, we reconsidered and reversed that recommendation in the light of the subsequent work that had been done on the Uniform Evidence Act and in the light of the general movement away from technical requirements which tie the hand of courts in doing justice. It is particularly relevant to note that a conviction of rape can now be made upon the uncorroborated evidence of the complainant and that it would be incongruous to provide that what amounts to a money judgment cannot be obtained upon evidence upon which a serious criminal conviction can be made and a man deprived of his liberty: the higher standard of proof required for a criminal offence does not remove the incongruity. We agree with the Uniform Evidence Act in recommending that it be done away with in paternity proceedings.

RECOMMENDATION #34

> *We recommend that a court not be precluded from making a finding of paternity upon the uncorroborated evidence of the child's mother and that s. 19(1) of the Maintenance and Recovery Act be repealed.*

6. Genetic Tests

(1) Existing Law

Blood tests are admissible in evidence. Sometimes a blood test can prove that a man is not the father of a child. Sometimes it can increase a statistical probability that a man is the father. Sometimes, in conjunction with other evidence pointing towards one man as a possible father, it may help with positive proof by excluding others. It is not clear whether or

not a court can direct that a blood test can be taken. The Ontario Law Reform Commission in their Report on Family Law, Part III, Children, on page 25, thought that in Canada, without statutory authority, the court "can neither order a party to submit to a blood test nor draw an inference from a party's failure to take such a test voluntarily." The case of S. v. S. etc. (1973), 11 R.F.L. 142 in the House of Lords discloses some difference of opinion as to whether or not a person who is sui juris can be directed to take a blood test but the proponents of the affirmative agree that the only sanctions are "a stay of proceedings, attachment or the treatment of a refusal as evidence against a disobedient party."

(2) Proposal

The Law Commission in England and the Ontario Law Reform Committee both thought that the court should have power to direct a blood tests, though only with the consent of the person to be subjected to it or of the person in whose care and control he is. England and New Zealand have legislation to that effect. The sanction is the drawing of inferences against the person refusing to give a blood sample.

We are in general agreement with those provisions. We do not think that the court's discretion should be confined; we expect that a judge will not make an order without considering whether or not the test is likely to be of value to the court, or without giving the person involved an opportunity to be heard, and we do not think it necessary to legislate about such matters. We think also that the court's discretion as to payment of the cost should not be confined.

We will now consider other kinds of genetic tests. Our understanding is that there are now some tests which may disprove paternity in some individual cases or give some assistance in proving it in others. They include such simple things as a mere resemblance of the child to the alleged father which so far appears to have been treated with suspicion by the courts, and comparisons relating to the colour of eyes, bone structure, or position of ear lobes, which require nothing from the persons involved [see McLeod v. Hill, [1976] 2 W.W.R. 593]. They include such things as finger and palm prints which can be taken with a minimum of inconvenience. They include tests which may be inconvenient or harmful; we understand, for example, that a test of the amniotic fluid before birth is attended by some risk. Again, we think that the court should have the power to order such tests, as it will take these matters into consideration.

Genetics is, we understand, a developing science, and new tests may be developed which give more accurate results, are freer from risk, or are less costly than those now available. We agree with the Law Reform Committee of South Australia when it says:

> In a field in which science is still developing any section which is too rigid or drawn with too much particularity may in the future prevent the admission of evidence obtained from tests which are today either unknown or too unreliable to be acceptable as evidence. Legislation should therefore be drafted in general terms and should generally permit the use of blood and genetic tests where in the opinion of the Court the evidence so obtained is relevant to the issue before it and the Court is satisfied of its reliability.

We think, however, that the power to order blood tests and other

genetic tests is not appropriate to summary proceedings, and we think that it should be restricted to the Court of Queen's Bench, where an application for a declaration of paternity can be made in any case in which it is desirable to obtain an order for such tests.

RECOMMENDATION #35

(1) That whenever the parentage of a child is in issue in a civil proceeding before the Court of Queen's Bench, the court upon application or upon its own motion be empowered to direct that the child and any person who is or may be a parent of the child undergo blood tests and such other genetic tests as are recognized by medical science and are relevant to the issue.

(2) That no test be performed on a person without his consent or the consent of a person having care and control of him.

(3) The court be empowered to draw such inferences as it sees fit from the refusal of a person to undergo any such test and if the person is a party may grant such relief as is claimed against him and refuse such relief as is claimed by him, but the dismissal of proceedings by reason of the refusal of an alleged parent shall be without prejudice to future proceedings on behalf of the child.

7. Limitation Periods

(1) Existing Law

There is no limitation period within which a legitimate child must establish his parentage.

In the case of an illegitimate child an affiliation order must be applied for within 24 months of the child's birth or within 12 months of an acknowledgement by the father. If the alleged father is out of Alberta at the end of the 24-month

period, the application may be made within 12 months after his return. Since an affiliation order is one foundation for an application by an illegitimate child under the Family Relief Act and for the child's limited right to share under the Intestate Succession Act, the limitation periods are to that extent carried forward by those two Acts.

An acknowledgement of paternity also gives the illegitimate child benefits under the Family Relief Act and the Intestate Succession Act. There is no limitation period; but by its nature an acknowledgement cannot be made after death.

No other limitation periods affect claims based upon the parentage of children, whether legitimate or illegitimate.

(2) Proposals for Change

(a) Where paternity is not presumed or acknowledged

To allow an alleged child to claim at any time would expose a man or his estate to the danger of a trumped-up claim which would be difficult to refute due to the imperfection of human memory and the disappearance of much relevant evidence. The danger is particularly great if the alleged father is not alive to deny the claim. It is to be expected that a claim will be made long after a child reaches adulthood only for the purpose of succeeding to property, which by itself is one of the less important objectives of our proposals. It is also to be expected that in a great majority of cases some investigation will be made soon after the child's birth or, if the father is truly interested, the father will come forward, so that a relationship is likely to be established if it is in the child's best

interest. Those considerations suggest that a short limitation period should be adopted. On the other hand, the desirability of removing distinctions between the legitimate child and the illegitimate child, as well as the demands of fairness, suggest that there be no limitation period. The question is where a balance should be struck.

The usual rule is that a limitation period should not run against a person under a legal disability. We think that that rule should apply here and that the child should have two years after his majority to advance a claim to a declaration of paternity; while time runs under section 59 of the Limitation of Actions Act where an infant is in the actual custody of a parent or guardian, we do not think that the child should lose such an important right merely because someone else does not advance it.

The situation will be different if the alleged father dies. The law should not expose all estates to the danger of trumped-up claims in order to do justice in a very few cases. We therefore think that in cases where there is no presumption or declaration of parentage with guardianship a claim based upon paternity should have to be brought while the alleged child and the alleged parent are both alive, unless the proceedings are brought before the expiration of two years after the child's birth.

(b) Where paternity is presumed or acknowledged

The situation is different if paternity is presumed under our previous recommendations by reason of cohabitation of the mother and father or by reason of an existing court order. There will usually be ample objective evidence to prove or disprove so

substantial a phenomenon as a year's cohabitation between the mother and father; and the existence of a court order implies proof of paternity by satisfactory evidence. In such cases there should not be any limitation placed on the assertion of a claim to a declaration of paternity. Further, if there were a limitation period the child or the father would have to take periodic proceedings to keep the legal relationship alive, and the law should not impose such a requirement.

We think that the situation is also different if the father has acknowledged the child by or through whom a claim is made against or through the father. It is clearly different if the acknowledgement is of public record, as in the case of t registration of a man as a child's father at the joint request of the mother and father, or if the acknowledgement is open and notorious as in the case of a child who is part of a man's household and raised by him as his own child. It is less clearly different if the acknowledgement is private but we nevertheless think that the courts can be relied upon to test the validity of the evidence of an acknowledgement and we think that our proposal should extend to all forms of acknowledgement, though only in favour of the child and those claiming through the child.

(c) Proof of maternity

We see no reason to suggest that any limitation be imposed upon proceedings in which the mother-child relationship is asserted, and we accordingly make no recommendation for change in the existing law on that subject.

RECOMMENDATION #36

(1) That no person be entitled to commence a proceeding in which it is alleged that the relationship of father and child subsists between two person except

(i) before the expiration of the period of twenty years following the birth of a child, or

(ii) within the joint lifetime of the father and the child,

whichever period first expires.

(2) That notwithstanding the death of the father or of the child proceedings may be commenced before the expiration of a period of two years following the birth of the child.

(3) This recommendation does not apply:

(i) if at the time of death the parent was presumed to be a parent under Recommendation #4,

(ii) if an order for a declaration of parentage is made in proceedings commenced within a period prescribed by subsection (1),

(iii) if at the time of the death a subsisting order of a court of competent jurisdiction in Alberta declares the parent to be a parent for the purposes of maintenance, or

(iv) for the purposes of a claim by or through the child, if the parent acknowledges the child.

(4) That this Recommendation does not apply to an application under Part 2 of the Maintenance and Recovery Act.

XII

CONCLUSION

It is our belief that legislation embodying the recommendations which we have made in this Report will so far as it is practicable and beneficial to do so place the child born out of wedlock in as good a legal position as the child born in wedlock. It is our hope that by removing the necessity of thinking about legitimate and illegitimate children in legal matters, and by its example, the legislation will do something to remove any continuing social disadvantages of children born out of wedlock.

J.W. BEAMES	J.C. LEVY
C.W. DALTON	T.W. MAPP
G.C. FIELD	R.S. NOZICK
R.G. HAMMOND	M.A. SHONE
W.H. HURLBURT	W.E. WILSON

CHAIRMAN

DIRECTOR

November, 1985

XIII

LIST OF RECOMMENDATIONS

RECOMMENDATION #1

(1) That the status and the rights and obligations of a child born out of wedlock be the same as if the child were born in wedlock.

(2) That save as provided in our Recommendations the status and the rights and obligations of the parents nd all kindred of a child born out of wedlock be the same as if the child were born in wedlock.

(3) Subsection (2) does not affect the status, rights or obligations of the parents as between themselves.

(4) That this Recommendation apply for all purposes of the law of Alberta notwithstanding any other Act.

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RECOMMENDATION #2

(1) That "child" be defined in the proposed Act to include a person who has attained his majority.

(2) That "child born in wedlock" and "child born out of wedlock" be defined in the proposed Act as follows:

"child born in wedlock" means a child whose parents were married to each other when the child was conceived or born or between those times and "child born out of wedlock" means any other child.

(3) That "marriage" and "married" be defined for the proposed Act as follows:

"marriage" includes a void or voidable marriage and "married" has a corresponding meaning.

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RECOMMENDATION #3

That the Legitimacy Act be repealed.

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RECOMMENDATION #4

That until the contrary is proved by a balance of probabilities a man be presumed to be the father of a child if

(i) at the time of the conception or birth of the child or between those times he is married to the child's mother;

(ii) he cohabits with the child's mother throughout the year preceding the child's birth;

(iii) he marries the mother of the child after the birth of the child and acknowledges that he is the father of the child; or

(iv) he is registered as the father of the child under the Vital Statistics Act or under a similar provision of the corresponding statute of another jurisdiction at the joint request of himself and the child's mother.

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RECOMMENDATION #5

(1) That "guardianship" and "guardian" be defined for the proposed Act as follows:

"Guardianship" means guardianship of the person of a minor child and includes the rights of control and custody of the child, the right to make decisions relating to the care and upbringing of the child and the

right to exercise all powers conferred by law upon the parent or guardian of a child, and "guardian" means a person with guardianship.

(2) That unless a court of competent jurisdiction otherwise orders, the following be joint guardians of a minor child:

(i) the mother of the child, and

(ii) a person who is presumed under Recommendation #4 to be the father of the child by reason of marriage to or cohabitation with the mother or because he marries the mother and acknowledges that he is the father of the child.

(3) That section 47 of the Domestic Relations Act be repealed.

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RECOMMENDATION #6

(1) That a person claiming to be the father, mother or child of another person or the father of an unborn child be entitled to apply to the Court of Queen's Bench for a declaration of parentage.

(2) That the court have jurisdiction to make a declaration of parentage if the child or alleged parent against whom an application is brought is resident in Alberta.

(3) That the court be required to grant a declaration of parentage upon being satisfied that the alleged father or mother is the father or mother of the child or unborn child.

(4) That any person acting on behalf of the child be entitled to make the application.

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RECOMMENDATION #7

(1) That unless the court otherwise directs, notice of an application for a declaration of parentage shall be given to

(i) the person claimed to be a child or any person named by law to be served on his behalf;

(ii) the guardian and the trustee of a dependant adult, or in the absence of a guardian or trustee, the Public Guardian or the Public Trustee;

(iii) any other person claiming to be a parent.

(2) That upon the application the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

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RECOMMENDATION #8

(1) That until the contrary is proved a man or woman be presumed to be the parent of a child if he or she is named as a parent in a subsisting declaration of parentage under Recommendation #6.

(2) That the granting of a declaration of parentage with or without guardianship terminate a presumption under Recommendation #4.

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RECOMMENDATION #9

(1) That a declaration of parentage remain in force until it is set aside under this Recommendation.

(2) That an application to set aside a declaration of parentage may with leave of the court be made to the court by which the declaration was made.

(3) That notice of the application be required to be given in the manner prescribed by Recommendation #7.

(4) That the court be empowered to confirm the declaration of parentage or set it aside.

(5) That the setting aside of a declaration of parentage not affect rights which vested while the declaration was in force.

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RECOMMENDATION #10

(1) That if the child is respect of whom an application for a declaration of parentage is brought is a minor, the alleged parent may apply for a declaration of parentage with guardianship.

(2) That if the child is alleged to be a child born out of wedlock a director or child of welfare:

(i) be given notice of an application for parentage with guardianship;

(ii) shall investigate the applicant's readiness, willingness and ability to undertake all of the obligations of parenthood including responsibility for the care of and upbringing of the child;

(iii) shall make a report of his investigation to the court; and

(iv) is entitled to be present and make representations upon the application.

(3) That upon or after the granting of a declaration of parentage and upon being satisfied that it is in the best interest of the child so to do the court may grant the declaration of parentage with guardianship.

(4) That a guardian named in a declaration of parentage with guardianship and any other

guardian of the child be joint guardians.

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RECOMMENDATION #11

(1) That in a declaration of parentage with guardianship the court be empowered to exclude any of the rights of guardianship.

(2) That at any time after it has made a declaration of parentage with or without guardianship the court upon application of a person described in Recommendation #6(1) or (3) and upon being satisfied that it is in the best interest of the child so to do be empowered to:

(i) revoke a right of guardianship granted by the declaration of parentage; or

(ii) confer guardianship if the declaration of parentage did not do so; or

(iii) vary the declaration as to the rights of guardianship granted or excluded by it.

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RECOMMENDATION #12

That upon the granting of a declaration of parentage without guardianship or at any time thereafter and upon being satisfied that it is in the best interest of the child so to do the court may grant access to the parent named in the declaration.

[Page 43]

RECOMMENDATION #13

(1) That the Domestic Relations Act be amended as

follows:

(i) as to subsection (1) of section 55, by inserting after the word "parents" the words "each of whom is a guardian" and by substituting the words "the children of whom they are the parents" for the words "the children of the marriage"; and

(ii) by adding a new subsection after subsection (5) of section 56 as follows:

(6) This section applies whether the minor is born in or out of wedlock but does not empower the court to grant custody of or access to the minor to a parent who is not a guardian of the minor.

(2) That the Provincial Court Act be amended by adding a new subsection after subsection 1 of section 32 as follows:

(1.1) Subsection 1 applies whether the child is born in or out of wedlock but does not empower the court to grant custody of or access to the child to a parent who is not a guardian of the child.

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RECOMMENDATION #14

That in a declaration of parentage with guardianship the court be required to provide for the surname by which the child is to be known.

[Page 48]

RECOMMENDATION #15

(1) That subsection (3) of section 3 of the Vital Statistics Act be amended by substituting the words "child born out of wedlock" for "illegitimate child".

(2) That the following subsection be added after subsection (13) of section 3 of the Vital Statistics Act:

(14) Upon receipt of a declaration of parentage with guardianship giving directions as to a child's surname the Director shall amend the registration in accordance with the order by making the necessary notation in the register.

(3) That section 5 of the Vital Statistics Act be repealed.

[Page 48]

RECOMMENDATION #16

(1) That the Change of Name Act be amended by inserting a new section 10.1 after 10:

10.1(1) This section applies if a person is named as father of a child born out of wedlock in an affidavit or a declaration filed with the Director of Vital Statistics under the proposed Status of Children Act of parentage with guardianship or by registration under the Vital Statistics Act at the joint request of himself and the mother of the child.

(2) The mother or the father may apply to change a given name or the surname of the child.

(2) That section 11 of the Change of Name Act be amended by renumbering subsections (1) to (5) inclusive as subsections (2) to (6) inclusive and by inserting a new subsection (1) as follows:

11(1) This section applies to cases not referred to in section 10.1.

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RECOMMENDATION #17

That the School Act be amended by substituting the following for subclause (i) of subparagraph (i) of

section 1:

(i) a person who is a guardian under the Status of Children Act or who is appointed a guardian under Part 7 or the Domestic Relations Act.

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RECOMMENDATION #18

That the father of a child born out of wedlock be entitled to appoint a guardian under section 48(1) of the Domestic Relations Act, but only if he is a guardian of the child.

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RECOMMENDATION #19

(1) That the following be substituted for section 1(a) of the Maintenance Order Act:

(a) "child" includes a child of a child, and the child of a husband or wife by a former marriage.

(2) That the following section be inserted after section 1 of the Maintenance Order Act:

1.1(1) This Act shall be read in conjunction with the Status of Children Act.

(2) Notwithstanding anything contained in this Act, a child is not obliged to provide maintenance for his father unless there is a presumption of paternity under section 4(1) of the Status of Children Act or a declaration of parentage with guardianship under section 5(3) of the said Act.

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RECOMMENDATION #20

That the Family Relief Act be amended by substituting the following for section 1(b):

(b) "child" includes

(i) a child of a deceased born after the death of the deceased, and

(ii) a child born out of wedlock

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RECOMMENDATION #21

(1) That paragraph (b) of subsection (1) of section 1 of the Criminal Injuries Compensation Act be amended by deleting the words "an illegitimate child and".

(2) That paragraph (a) of section 1 of the Fatal Accidents Act be amended by substituting the words "and stepdaughter" for the words "stepdaughter, and illegitimate child".

(3) That paragraph (c) of subsection (1) of section 1 of the Workers' Compensation Act be amended by deleting the words "a child born out of wedlock".

[Page 59]

RECOMMENDATION #22

That the Intestate Succession Act be amended as follows:

(1) By substituting the following for section 1(b):

1(b) "issue" includes all lineal descendants of the ancestor.

(2) By substituting the following for section 13:

13. For all purposes of this Act a child

born out of wedlock is treated the same as a child born in wedlock.

(3) By repealing section 14.

[Page 61]

RECOMMENDATION #23

(1) That the rule of construction whereby in a will, deed or other instrument words of relationship signify only legitimate relationship in the absence of a contrary intention be abolished.

(2) That the Wills Act be amended by repealing section 36.

[Page 62]

RECOMMENDATION #24

(1) That the proposed Act not affect rights vested before its commencement.

(2) That save as provided in subsection (1) the proposed Act apply to persons born and instruments executed before as well as after its commencement.

[Page 65]

RECOMMENDATION #25

(1) That a person claiming to be a parent of a child born out of wedlock may file with the Director of Vital Statistics:

(i) a declaration of parentage or, in the case of a man who is presumed to be the father of a child by reason of cohabitation with the child's mother, an affidavit swearing that the deponent

cohabited with the mother of the child throughout the year preceding the child's birth and swearing to the deponent's belief that he is the father of the child;

(ii) if not otherwise provided, the name, date of birth, place of birth and sex of the child and, if known, the birth registration of the child and the name of the other parent; and

(iii) his address for service within the province which he may from time to time change by notice in writing filed with the Director of Vital Statistics.

(2) That the Director of Vital Statistics shall maintain a register of declarations of parentage and affidavits filed under subsection (1) and shall provide the name and address of a person claiming to be a parent of the child to any party to a proceeding or proposed proceeding involving the child, and to any person requiring the consent of the parent to a matter affecting the child.

(3) That unless the court having jurisdiction over the subject matter of a proceeding otherwise orders, service of a notice by registered mail addressed to the last address for service filed with the Director of Vital Statistics is good and sufficient service.

(4) That except as provided in subsection (2) or by order of the court the existence or the contents of a declaration of parentage or affidavit filed under this section shall not be made public or disclosed to any person.

(5) That upon making a finding that a person filing an affidavit under subsection (1) is not the father of the child or did not cohabit with the child's mother as set forth in the affidavit the court may direct that the affidavit be removed from the register and the affidavit thenceforth shall be deemed not to have been filed.

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RECOMMENDATION #26

(1) That the Provincial Court Act be amended by adding the following subsections after subsection (9) of section 32:

(10) If the child is born out of wedlock, notice of an application shall unless the court otherwise orders be given to a person named as the father of the child in a declaration of parentage or affidavit filed under the proposed Status of Children Act and to a person registered as the father of the child at the joint request of himself and the mother, or as ordered by the court.

(11) Upon the application the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

(2) That the Domestic Relations Act be amended by inserting a new section 45.1 after section 45:

45.1 Upon any application under this Part or Part 5 which affects the guardianship or custody of or the right of access to a child born out of wedlock, the court shall

(i) consider whether or not any other person should receive notice; and

(ii) direct that notice be given to any person who in its opinion should have an opportunity to be heard.

[Page 72]

RECOMMENDATION #27

We recommend that the Child Welfare Act be amended to include in the definition of "guardian" a person who is or is appointed a guardian of the child under the Status of Children Act.

[Page 77]

RECOMMENDATION #28 - deleted

RECOMMENDATION #29 - deleted

RECOMMENDATION #30

That the Change of Name Act 1973 be amended as follows:

(1) By adding to section 10.1 as proposed in Recommendation #16 the following subsection:

(3) The mother or father may not apply under this section without the consent of the other parent of the child.

(2) By inserting the number "10.1" after the number "10" in subsection (3) of section 14.

[Page 78]

RECOMMENDATION #31

(1) That subsection (1) of section 34 of the Vital Statistics Act be amended by deleting the word "A" at the beginning of the subsection and substituting the words "Subject to subsection (1.1), a".

(2) That the following subsection be added after subsection (1) of section 34:

(1.1) Where the parentage of a child born out of wedlock is in issue, any certificate, certified copy or photographic print referred to in subsection (1) is admissible in any court in the Province as evidence of the facts certified to be recorded or recorded therein.

(3) That subsections (3) and (4) of section 34 be repealed.

[Page 82]

RECOMMENDATION #32

That whenever the parentage of a child is in issue in a civil proceeding before a court in Alberta, the court

(i) shall have regard to any subsisting presumption of parentage under Recommendations #4 and #8(1).

(ii) shall admit as evidence an order or judgment of any court of competent jurisdiction in Canada which expressly or by implication determines the parentage of the child.

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RECOMMENDATION #33

(1) That the Alberta Evidence Act be amended by adding the following subsection after subsection (2) of section 7:

(3) Subsection (1) does not apply to the determination in a civil proceeding of any issue involving the parentage of a child, but evidence given on any such issue tending to show the commission of adultery is inadmissible in any other civil proceeding or on any other issue in the same proceeding.

(2) That an admission of parentage be admissible in evidence in civil proceedings without proof that it is free and voluntary.

[Page 86]

RECOMMENDATION #34

We recommend that a court not be precluded from making a finding of paternity upon the uncorroborated evidence of the child's mother and that s. 19(1) of the Maintenance and Recovery Act be repealed.

[Page 88]

RECOMMENDATION #35

(1) That whenever the parentage of a child is in issue in a civil proceeding before the Court of Queen's Bench, the court upon application or upon its own motion be empowered to direct that the child and any person who is or may be a parent of the child undergo blood tests and such other genetic tests as are recognized by medical science and are relevant to the issue.

(2) That no test be performed on a person without his consent or the consent of a person having care and control of him.

(3) The court be empowered to draw such inferences as it sees fit from the refusal of a person to undergo any such test and if the person is a party may grant such relief as is claimed against him and refuse such relief as is claimed by him, but the dismissal of proceedings by reason of the refusal of an alleged parent shall be without prejudice to future proceedings on behalf of the child.

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RECOMMENDATION #36

(1) That no person be entitled to commence a proceeding in which it is alleged that the relationship of father and child subsists between two person except

(i) before the expiration of the period of twenty years following the birth of a child, or

(ii) within the joint lifetime of the father and the child,

whichever period first expires.

(2) That notwithstanding the death of the father or of the child proceedings may be commenced before the expiration of a period of two years following the birth of the child.

(3) This recommendation does not apply:

(i) if at the time of death the parent was presumed to be a parent under Recommendation #4,

(ii) if an order for a declaration of parentage is made in proceedings commenced within a period prescribed by subsection (1),

(iii) if at the time of the death a subsisting order of a court of competent jurisdiction in Alberta declares the parent to be a parent for the purposes of maintenance, or

(iv) for the purposes of a claim by or through the child, if the parent acknowledges the child.

(4) That this Recommendation does not apply to an application under Part 2 of the Maintenance and Recovery Act.

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RECOMMENDATION #37 - deleted

XIV

APPENDICES

The reader should note that the Appendices have not been revised or updated to reflect changes since Report 20 was issued in 1976.

APPENDIX I*

Table I. Comparison of total number of illegitimate births in Alberta with number born to "common law" unions between 1963 and 1974

Year	Total number of illegitimate births	Total number of illegitimate children born into a common law union	Percentage of illegitimate children born into a common law union	Percentage of illegitimate children born to non-cohabiting parents
1974	3,411	814	23.86	76.14
1973	3,188	1,284	40.28	59.72
1972	3,050	541	17.74	82.26
1971	3,776	780	20.66	79.34
1970	4,146	1,102	26.58	73.42
1969	3,943	1,133	28.73	71.27
1968	3,632	1,072	29.52	70.48
1967	3,551	1,042	29.34	70.66
1966	3,290	1,132	34.41	65.59
1965	3,252	1,328	40.84	59.16
1964	3,001	1,184	39.45	60.55
1963	2,681	1,024	38.19	61.81
Total	40,921	12,436	30.39	69.61

Source: Statistical information supplied by the Department of Social Services and Community Health, Province of Alberta.

*This Appendix is reproduced from Report 20 without revision or updating.

APPENDIX I (Continued)

Table II. Trend in the number of babies of unwed mothers being surrendered for adoption between 1963 and 1974

Year Year	Total number of illegitimate births	Total number of babies surrendered	Percentage of illegitimate births surrendered for adoption
1974	3,411	588	17.2
1973	3,188	589	18.4
1972	3,050	717	23.5
1971	3,766	895	23.7
1970	4,146	1,284	30.9
1969	3,943	1,380	34.9
1968	3,632	1,379	37.9
1967	3,551	1,316	37.0
1966	3,290	1,185	36.0
1965	3,252	1,214	37.3
1964	3,001	1,048	34.9
1963	2,681	1,009	37.6
TOTAL	40,911	12,604	30.8

Source: Statistical information supplied by the Department of Social Services and Community Health, Province of Alberta.

APPENDIX II*

COMPARISON OF THE EXISTING LAW RELATING TO LEGITIMACY AND ILLEGITIMACY

PART 1: RELATIONSHIP OF CHILD WITH PARENTS

Legal Incident	Legitimate Child	Illegitimate Child
(1) Guardianship (of the person): the total bundle of rights and duties which a parent or other adult may exercise in relation to the upbringing of a child, encompassing, among other incidents custody, access, and control over education and religion.	Mother and father are joint guardians, Domestic Relations Act, s. 39.	Mother is sole guardian, Domestic Relations Act, s. 39. Father could be appointed guardian Domestic Relations Act, ss. 41 and 42.
(2) Incidents of guardianship		
(i) Custody: charge over the physical person of a child		
(a) by guardianship	Mother and father as guardians, have custody, Domestic Relations Act, s. 52(2)(d).	Mother, as guardian has custody, Domestic Relations Act, s. 52(2)(d).
(b) by court order	Mother or father may apply for custody	Mother or father may apply for custody

*This Appendix is reproduced from Report 20 without revision or updating.

Legal Incident	Legitimate Child	Illegitimate Child
	Domestic Relations Act, ss. 46, 47 and 49.	Domestic Relations Act, s. 46; Nelson v. Findlay and Findlay, [1974] 4 W.W.R. 272 (Alta. S.C.). Father may gain custody as an "other responsible person" Domestic Relations Act, ss. 47 and 49.
	Mother or father as parents living apart, may apply for custody Family Court Act, s. 10.	Mother may apply for custody, Family Court Act, s. 10 Query: Can Family Court award custody to father? See White v. Barrett, [1973] 3. W.W.R. 293 (Alta. App. Div.) at 300.
(ii) Access: right to visit a child who is in the custody of another person.	Mother or father may apply for access Domestic Relations Act, s. 46.	Mother or father may apply for access, Domestic Relations Act, s. 46; Nelson v. Findlay and Findlay.
	Mother or father, as parents living apart may apply for access, Family Court Act, s. 10	Mother or father as parents living apart may apply for access, Family Court Act, s. 10 White v. Barrett.

Legal Incident	Legitimate Child	Illegitimate Child
(iii) Name:	Child registered in father's surname or in father's surname hyphenated or combined with mother's surname Vital Statistics Act, s. 4.	Child usually registered in unmarried mother's surname, or in married mother's husband's surname; however, if the mother and father together so request in writing (and if, in the case of a woman married to another man, the mother was living separate and apart from her husband at the time of conception), child may be registered in father's surname, or in father's surname hyphenated or combined with mother's surname Vital Statistics Act, s. 4.
	Mother and father, as parents and guardians, may apply to change child's given name Vital Statistics Act s. 8	Mother, as parent and guardian, may apply to change child's given name Vital Statistics Act s. 8 Query: Is father a "parent"?

Legal Incident	Legitimate Child	Illegitimate Child
	Mother and father, as parents and guardians, may apply for and must consent to a change of child's given name or surname Change of Name Act 1973 ss. 5, 6 and 7	Mother may apply to change a given name or the surname of the child; father must consent to the use of his name where the mother is cohabiting with him as wife and husband, but not otherwise. Use of the putative father's surname is restricted Change of Name Act 1973, s. 8.
(iv) Education	Mother and father, as guardians, have the care of child's education. Domestic Relations Act, s. 52(2)(d).	Mother, as guardian, has the care of the child's education. Domestic Relations Act, s. 52(2)(d). Father may be a "parent" for purposes of the School Act, s. 2(i)(iii) where he is a person who completely maintains, supports and controls a child as a parent would. The School Act, s. 2(i)(iii)

Legal Incident	Legitimate Child	Illegitimate Child
(v) Religion	Mother and father, as parents and guardians, may determine child's religion.	Mother, as parent and guardian, may determine the child's religion. Father may be an "other responsible person" and as such have a legal right to determine child's religion; if so, the court may ensure that the child is brought up in that religion on an unsuccessful custody application Domestic Relations Act, s. 50
(vi) Marriage	Mother and father, as parents and guardians, or if they are separated, the parent having legal custody must consent to the marriage of a child under 18 years of age Marriage Act, s. 18.	Mother, as parent and guardian, must consent to the marriage of a child under 18 years of age Marriage Act, s. 18. Query: Is father a "father" or "parent"?
(vii) Management of Property	Mother and father as parents and guardians, have certain powers to act on child's behalf in the management of property. Infants Act, ss. 2, 3, 8, 8.1, 10 and 16.	Mother as parent and guardian, has certain powers to act on child's behalf in the management of property Infants Act, ss. 2, 3, 8, 8.1, 10 and 16.

Legal Incident	Legitimate Child	Illegitimate Child
		Father may have powers as a "next friend" or "other person" or "parent", Infants Act, ss. 3, 10 and 16.
(viii) Testamentary Guardianship: appointment by deed or will, by the parent of an infant of a person to be guardian after the death of the parent.	Mother and father, as parents, may appoint a testamentary guardian Domestic Relations Act, s. 40.	Mother, as parent, may appoint a testamentary guardian. Domestic Relations Act, s. 40. Query: Is father a "parent"?
(3) Wardship: guardianship in the Crown (permanent wardship ends the legal relationship between the child and both parents for upbringing purposes). Child Welfare Act, Part 2.		
(i) Neglect: a judicial finding made in a proceeding brought by the state to remove the upbringing of a child from the	Mother and father, as parents and guardians, are entitled to notice of wardship proceedings Child Welfare Act s. 19(1).	Mother, as parent and guardian, and father as parent where, in the opinion of the Director of Child Welfare, he stands in loco parentis to

Legal Incident	Legitimate Child	Illegitimate Child
control of his parents (or other persons having this control).		the child, are entitled to notice of wardship proceedings. Child Welfare Act, ss. 14(f) and 19(1)
(ii) Voluntary surrender for Adoption: the procedure whereby parents give a child up to the state as a permanent ward.	Mother and father, as guardians and parents, may surrender custody of child for adoption Child Welfare Act, s. 30.	Mother alone, as guardian and parent, may surrender custody of child for adoption Child Welfare Act, s. 30; obiter dicta in Gingell v. The Queen (1975), 55 D.L.R. (3d) 589 (S.C.C.)
(4) Adoption: the creation for all purposes of the legal relationship of parent and child between persons not otherwise so related as if the child had been born to the parent in lawful wedlock; it entails the extinction of existing relationships.	Mother and father, as guardians, must consent to adoption. Child Welfare Act, s. 54.	Mother, as guardian must consent to adoption. Child Welfare Act, s. 54. Father's consent to adoption is not required. Gingell v. The Queen, obiter dicta.

PART 2: FINANCIAL MATTERS AFFECTING CHILD[1]

Legal Incident	Legitimate Child	Illegitimate Child
(1) Maintenance: the furnishing by one person to another, for his support, of the means of living, or or food or clothing, shelter, etc.		
(i) By a living person	The father, unless he is unable, and then the mother if she is able, has the duty to provide maintenance	Father may be ordered to pay for a child's maintenance; proceedings are summary and must be brought within a

[1] In addition to the provisions mentioned in the chart, the Workers' Compensation Act, the Fatal Accidents Act, and the Criminal Injuries Compensation Act provide for compensation to family members in case of mishap to one of them. These statutes define "child" to include "illegitimate" and are silent as to the standard for determination of paternity. This means that an illegitimate child may benefit under them. Other statutes related to the provision of maintenance give no guidance for the interpretation of words denoting familial relationship. Examples of such statutes are: The Social Development Act ("parent" and "child" ss. 2(b1)(ii) and 8(1)); the Maintenance and Recovery Act, Part 3 ("parent" and "child", s. 56 also referring to the Social Development Act, the Domestic Relations Act--protection orders--and the Reciprocal Enforcement of Maintenance Orders Act); the Public Service Pension Act; the Public Service Management Pension Act; the Local Authorities Pension Act, the Teachers' Retirement Fund Act; the Alberta Insurance Act, parts 6 and 8; and the Alberta Health Care Insurance Act. This list is not comprehensive.

Legal Incident	Legitimate Child	Illegitimate Child
	for a child under the age of 16 years. Maintenance Order Act, ss. 3 and 4.	specified period of time. Maintenance and Recovery Act, Part 2 ss. 14(1), 20 and 21.
	Family members (husband, wife, father, mother, grandfather, grandmother, children, grandchildren), who are able, have the obligation to provide maintenance for a disabled or destitute family member Maintenance Order Act, ss. 3 and 4.	Mother may be ordered to contribute to child's maintenance Maintenance and Recovery Part 2, ss. 20 and 21.
	Father or mother may be ordered to pay maintenance for a child on an application for custody. Domestic Relations Act, s. 46(5).	Father or mother may be ordered to pay maintenance for a child on an application for custody. Domestic Relations Act, s. 46(5); Nelson v. Findlay and Findlay.
	Father or mother, as parents may be ordered to reimburse another person, school or institution for the cost incurred in bringing up a child. Domestic Relations Act, s. 48.	Mother, as parent, may be ordered to reimburse another person, school or institution for the cost incurred in bringing up a child. Domestic Relations Act, s. 48.

Legal Incident	Legitimate Child	Illegitimate Child
		An order may be made against the father if he is a "parent" or "other responsible person". Domestic Relations Act, s. 48.
	Father (husband) may be ordered to pay maintenance for a child on the application of the mother (a married woman) in a summary proceeding before a judge of the Family Court. Domestic Relations Act, s. 27; Family Court Act, s. 4(2)(a).	Query: Does section 27 of the Domestic Relations Act apply?
(ii) Out of the estate of a deceased person	The estate of a deceased mother or father is liable for proper maintenance and support of a child Family Relief Act, s. 2	The estate of a deceased mother or father is liable for proper maintenance and support of a child, provided in the case of the father that one of the tests for paternity set out in the Act is met. Family Relief Act, ss. 2 and 3

Legal Incident	Legitimate Child	Illegitimate Child
(2) Disposition of Property: parting with ownership of property.		
(i) Intestate succession: devolution of title to property under the law where the deceased person has not left a will.	Child shares in the estate of deceased mother or father Intestate Succession Act, s. 3.	Child shares in the estate of deceased mother as if he were a legitimate child. Intestate Succession Act, s. 15.
		Child shares in estate of deceased father if the father is not survived by a widow or lawful issue, and if one of the tests for paternity set out in the Act is met Intestate Succession Act, s. 16.
	Child may share through mother or father in a deceased person's estate. Intestate Succession Act, ss. 4, 7, 8 and 9	Child may share through mother in a deceased person's estate. Intestate Succession Act, ss. 4, 7, 8, 9 and 15.

Legal Incident	Legitimate Child	Illegitimate Child
	Mother and father may, share in the estate of a deceased child. Intestate Succession Act, s. 6.	Mother, but not father may share in the estate of a deceased child. Intestate Succession Act, ss. 6 and 15.
(ii) Wills	For purposes of construction of a will, except where a contrary intention appears, words denoting family relationship are construed to mean legitimate relationships	For purposes of construction of a will, except when a contrary intention appears, an illegitimate child is treated as if he were the legitimate child of his mother, but not of his father. Wills Act, s. 35.
(iii) Other written instruments:	For purposes of construction of other written instruments except where a contrary intention appears, words denoting family relationship are construed to mean legitimate relationships.	For purposes of construction of other written instruments, except where a contrary intention appears, words denoting family relationship are construed to exclude illegitimate relationships.
(iv) Administration of Estates	On death of mother or father, dependent child is entitled to copy of application for grant of probate and notice of rights	On death of mother dependent child is entitled to copy of application for grant of probate and notice of rights of dependants

Legal Incident	Legitimate Child	Illegitimate Child
	of dependants under the Family Relief Act, Administration of Estates Act, s. 8.	under the Family Relief Act, Administration of Estates Act, s. 8. Query: Is illegitimate child so entitled on death of father?

APPENDIX III*

PUBLIC ATTITUDES TOWARD ILLEGITIMACY IN ALBERTA[1]

Department of Health and Social Development
Research and Planning Branch
Administration Building
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MICHAEL C. JANSSON, B.A., M.Sc.
Research Officer

Purpose

The purpose of this study was to establish through survey research techniques whether or not contemporary public opinion favours significant changes in the law respecting illegitimacy. More specifically, the study sought to discern the relationship between current legislation and public attitudes towards illegitimacy in Alberta. The results and conclusions of this study will serve to compliment the findings of a study focusing on the legal aspects of illegitimacy currently being conducated at the University of Alberta, Institute of Law Research and Reform. The results of these studies will serve as basic inputs to the process of legislative change and policy formulation.

Historical Attitudes

Krause begins his definitive study of illegitimacy with this quotation:

> The bastard, like the prostitute, thief, and beggar, belongs to that motley crowd of disreputable social types which society has generally resented, always endured. He is a living symbol of social irregularity, and undeniable evidence of contra-moral forces; in short, a problem--a problem

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[1]This paper is a summary of the report "Public Attitudes Toward Illegitimacy in Alberta" prepared by MICHAEL E. MANLY-CASIMIR of L. W. Downey Research Associates Ltd. and commissioned by Alberta Health and Social Development.

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> as old and unsolved as human existence itself.[2]

Historically, the illegitimate child has been subject to legal and social discrimination but its form has varied from place to place, from time to time. Roman law denied the illegitimate child a legal relationship with his father but ultimately recognized the child's legal relationship with his mother. In contrast, in medieval Central Europe the illegitimate child had no legal relationship with either father or mother and was essentially rightless. In England, the common law declared the illegitimate child "filius nullius" meaning "no one's son". The chief consequence of this status was that the illegitimate child could not inherit. Otherwise, as Krause points out, "illegitimacy seems to have had no serious legal consequences". In contrast to attitudes in Central Europe, Krause observes that English attitudes towards illegitimacy seem to have been relatively liberal. Still, the doctrine of filius nullius has persisted and has effectively denied the illegitimate child legal equality with the legitimate child. It has, moreover, substantially influenced the legal status of the illegitimate child in those countries, like English Canada, whose legal systems derive from English Common Law.

Reform of the law affecting illegitimate children has occurred largely in this century. Concern with extending legal equality to the illegitimate child is reflected in most reform efforts. Norway led the way in 1915 by affirming substantial equality for illegitimate children in their legal relationship to both mother and father. This statute was subsequently superseded in 1956 with a law abolishing all remaining legal distinctions between legitimate and illegitimate children. Other Scandinavian countries, notably Denmark and Sweden, have also moved to accord equal rights to the illegitimate child. In the United Kingdom the Family Law Reform Act of 1969 granted the illegitimate child the right of intestate succession to his father as well as his mother. New Zealand law accords equivalent legal status to the illegitimate and legitimate child. In the United States, the liberal trend has been

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[2]Davis, "Illegitimacy and the Social Structure", American Journal of Sociology XLV (1939), p. 215. Cited in Harry D. Krause, Illegitimacy Law and Social Policy (New York: Bobbs-Merrill, 1971), p. 1. This section draws heavily on Krause's introductory discussion, pp. 1-7, and pp. 175-179.

concerned with extending to illegitimate children the same care and legal and social rights enjoyed by their legitimate counterparts. For example, an increasing number of states no longer record illegitimate status on birth records. Several states, notably North Dakota, Arizona, Oregon, and Alaska have enacted legislation affirming equality for the illegitimate child.

In spite of these liberal trends, the legal and social inequality of the illegitimate child persists in many jurisdictions. Alberta law still discriminates against the illegitimate child. Legislation in Alberta now recognizes the legal relationship between the mother and the illegitimate child, but only recognizes the relationship between the father and the illegitimate child in limited circumstances. In general, the illegitimate child in Alberta is still legally and socially disadvantaged because of his birth status.

Illegitimacy in Alberta

Illegitimacy in Alberta since 1921 has generally equalled or exceeded national rates. During the period 1921-1940 the Alberta rate closely paralleled the national rate; however, after World War II the Alberta rate increased faster than national rates. Although national rates did increase dramatically in the last decade, they were substantially exceeded by the Alberta rate increases. A comparison of 1961 and 1971 Canada and Alberta rates is shown below.

Illegitimacy Rates (% of Live Births) Canada and Alberta 1961 to 1971 (selected years)

Year	Canada	Alberta
1961	4.5	6.2
1963	5.3	7.1
1965	6.7	9.8
1967	9.3	11.5
1969	9.2	12.3
1970	9.6	12.8
1971	9.0	11.9

Source: Statistics Canada

There is some evidence that illegitimate rates may be declining from the peak period of 1968-1970. The increase in the number of therapeutic abortions occurring simultaneously with the illegitimacy rate decline may suggest a tentative relationship between these two phenomena.

Public Attitudes Toward Illegitimacy

What, then, are the attitudes of Albertans toward illegitimacy? Are prevailing attitudes congruent with provincial laws respecting illegitimacy? To what extent are Albertans willing to accept change in these laws? These central questions served as a guiding basis for the construction of a 27-question interview scheduled with three foci: 1) The relationships between parties in the illegitimacy situation; the rights and responsibilities of each party in the situation; and the social issues involved in illegitimacy.

A representative sample of 997 Albertans was interviewed. Respondent attitudes to each question were cross tabulated in response by subsamples. The variables used included sex, age, marital and parental status, occupation, denomination and church attendance, income, education, and size of community.

Highlights of Findings

Relationships

Two questions were asked concerning the relationship of the illegitimate child to his/her parents.

There was virtual unanimity among respondents that the illegitimate child should have the same relationship with his mother that the legitimate child enjoys. There was less agreement among respondents regarding the illegitimate child's paternal relationship. Still, fully two-thirds of the respondents say that the illegitimate child should have the same paternal relationship as the legitimate child; one-third say there should be a difference under certain conditions. On balance, responses to these questions seem to oppose differences on both maternal and paternal relationships between children on the basis of their birth status.

Public attitudes towards the rights of the mother and father of an illegitimate child seem mixed. There appears to be no consensus among respondents on the issue of paternal rights in general. Although the majority of respondents apparently think that the father should have the right to visit his illegitimate child, they differ on the conditions of this right. There is no consensus on whether the mother and father should have equivalent rights to custody of an illegitimate child, but where the mother cannot or does not want to keep the child, the consensus is that the father should be given custody. The majority

of respondents favour a fitness test as a precondition for maternal custody and oppose the idea that the mother should have the right to determine her child's religious upbringing when surrendering the child for adoption.

Attitudes towards the rights of the illegitimate child reflect fairly clear consensus. A large majority agree that the illegitimate child should have a right to inherit from his intestate father's estate; to the same natural ties to his father and relatives on his father's side as the legitimate child where the mother keeps the child; and to know his ancestral and ethnic background if he wishes, both when the mother keeps the child and when he is adopted. Opinion is divided on whether the illegitimate child should have the right to natural ties with his mother and father when adopted.

Public attitudes towards the responsibilities of the father are unambiguously clear. The illegitimate child's father should have the same responsibilities towards this child as he has towards a legitimate child. In particular, he should be responsible for financial support for the child to some extent--the majority of respondents setting the extent at the level a father would pay towards the support of a legitimate child after divorce.

Finally, in situations where the father cannot be identified and the mother cannot provide adequate support herself, the consensus is that welfare authorities should contribute to the support of the illegitimate child.

Social Issues

Eleven questions were asked considering the broader social issues involved with illegitimacy, e.g., the father's financial obligations; the social distinction of the illegitimate child; and the treatment of the parents of the illegitimate child.

Public attitudes on the social issues considered are consistently moderate. The majority of respondents feel that eliminating distinctions between legitimate and illegitimate children will not contribute to the breakdown of family life in Canada; that neither discriminating against illegitimate children nor making more effort to identify fathers of illegitimate children and forcing them to be financially responsible for their children will discourage sexual relations between unmarried persons; that a child born of unmarried parents should not be distinguished legally or socially from a child born of married parents; that neither the mother nor the father should be censured or punished, but should be understood and helped--the father should, however, be required to provide financial

support for the mother and child; and that if social action is to be taken in response either to a mother or father who has two illegitimate children by different mates, it should be preventive and rehabilitative rather than punitive in nature.

Conclusion

The survey results now make it possible to answer the three questions posed at the beginning of this section: What are the attitudes of Albertans toward illegitimacy? Are prevailing attitudes congruent with provincial laws respecting illegitimacy? To what extent do Albertans seem willing to accept fundamental changes in illegitimacy laws?

Attitudes of Albertans

The attitudes of Albertans toward illegitimacy seem to be more moderate than extreme, more liberal than conservative, more preventive than punitive. Overall, respondents favouring a more liberal attitude toward the illegitimate child tend to be younger, with higher incomes and more education. Conversely, respondents favouring a more conservative approach tend to be older, with lower incomes and less education.

What is particularly remarkable is the extent to which there appears to be a common, province-wide set of attitudes favouring liberalization of the law regarding illegitimacy. Albertans consistently affirm, in their responses, the principle of equality for illegitimate children vis-a-vis legitimate children--equality expressed in terms of maternal and paternal relationships, paternal inheritance and familial ties, ancestral and ethnic background. They affirm a full equality for the illegitimate child, not because he is "illegitimate" but because he is a child. In effect, Albertans say that it is the mother and father who are and should be responsible for their actions in conceiving and bearing an illegitimate child; the child should not be stigmatized, discriminated against, or treated as a "non-person" as a consequence. It is not his fault he was born, so he should not suffer the consequences of his parents' actions. Thus, Albertans question the acceptability and utility of the very concept of "illegitimacy".

Congruence of Attitudes and Law

Judging from the responses to the survey, public attitudes are fundamentally incongruent with existing law respecting illegitimacy. While the law has remained

substantially unchanged over time, public attitudes have clearly evolved far beyond the provisions of the law. The expressed concern of Albertans to extend full equality to the illegitimate child indicates the extent of the incongruence between attitudes and law.

Public Willingness to Change

If the responses reported here are a fair reflection of public opinion, there can be little doubt of the willingness of Albertans to see the laws respecting illegitimacy changed. Indeed, there appears to be a singularly favourable climate of public opinion at this time.

The Editor
Behavioural Research and Service Newsletter
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APPENDIX IV*

CURRENT ALBERTA STATUTES REFERRED TO
(as amended)

Administration of Estates Act, R.S.A. 1970, c. 1.
Alberta Evidence Act, R.S.A. 1970, c. 127.
Alberta Health Care Insurance Act, R.S.A. 1970, c. 166.
Alberta Insurance Act, R.S.A. 1970, c. 187.
Change of Name Act, S.A. 1973, c. 63.
Child Welfare Act, R.S.A. 1970, c. 45.
Criminal Injuries Compensation Act, R.S.A. 1970, c. 75.
Domestic Relations Act, R.S.A. 1970, c. 113.
Family Court Act, R.S.A. 1970, c. 133.
Family Relief Act, R.S.A. 1970, c. 134.
Fatal Accidents Act, R.S.A. 1970, c. 138.
Infants Act, R.S.A. 1970, c. 185.
Interpretation Act, R.S.A. 1970, c. 189.
Intestate Succession Act, R.S.A. 1970, c. 190.
Judicature Act, R.S.A. 1970, c. 193.
Legitimacy Act, R.S.A. 1970, c. 205.
Local Authorities Pension Act, R.S.A. 1970, c. 219.
Maintenance and Recovery Act, R.S.A. 1970, c. 223.
Maintenance Order Act, R.S.A. 1970, c. 222.
Marriage Act, R.S.A. 1970, c. 226.
Married Women's Act, R.S.A. 1970, c. 227.
Public Service Management Act, S.A. 1972, c. 81.
Public Service Pension Act, R.S.A. 1970, c. 299.
School Act, R.S.A. 1970, c. 329.
Social Development Act, R.S.A. 1970, c. 345.
Teachers' Retirement Fund Act, R.S.A. 1970, c. 361.
Vital Statistics Act, R.S.A. 1970, c. 384.
Wills Act, R.S.A. 1970, c. 393.
Workers' Compensation Act, S.A. 1973, c. 87.

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